TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1923.

No. 456.

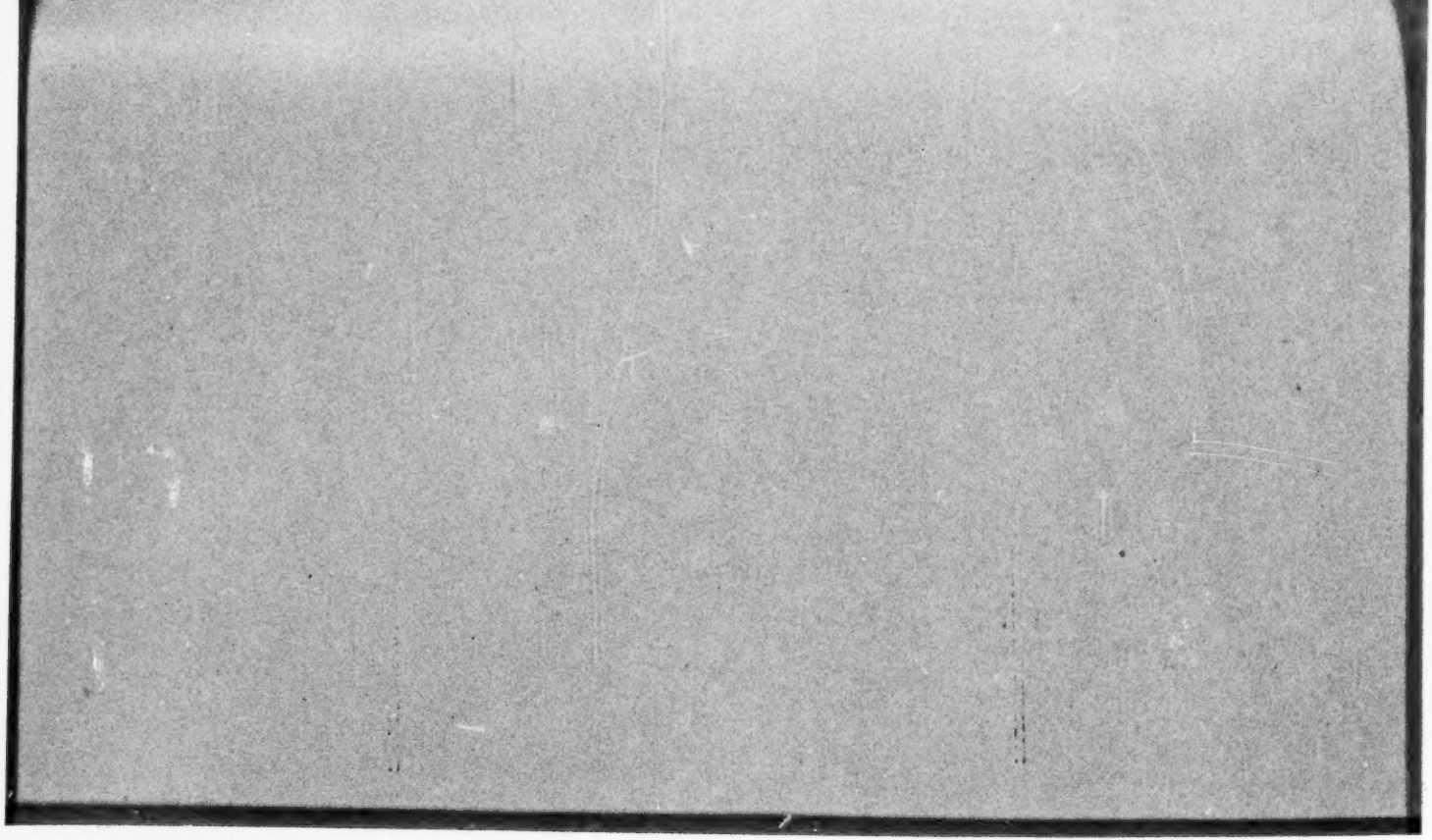
THE UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION, APPELLANTS,

vs.

ABILENE & SOUTHERN RAILWAY COMPANY, THE ATCHISON, TOPEKA & SANTA FE RAILWAY COMPANY, THE CHICAGO, ROCK ISLAND & PACIFIC RAILWAY COMPANY, ET AL.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF KANSAS.

FILED JULY 25, 1923.



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INDEX.

1 *Citation on appeal.*

Filed May 31, 1923. [Omitted in printing.]

Service of a copy of the within citation is hereby admitted and acknowledged this 28th day of May, 1923.

T. J. NORTON,
M. G. ROBERTS,
Solicitors for Appellees.

[File endorsement omitted.]

2 In the District Court of the United States for the District of Kansas, Second Division.

ABILENE & SOUTHERN RAILWAY COMPANY; the Atchison, Topeka & Santa Fe Railway Company; the Chicago, Rock Island & Pacific Railway Company; the Clinton & Oklahoma Western Railroad Company; Ft. Worth & Denver City Railway Company; the Galveston, Harrisburg & San Antonio Railway Company; Gulf, Colorado & Santa Fe Railway Company; Midland Valley Railroad Company; Missouri, Kansas & Texas Railway Company of Texas (C. E. Schaff, receiver); Missouri Pacific Railroad Company; St. Louis-San Francisco Railway Company; the Texas & Pacific Railway Company (J. L. Lancaster and Charles L. Wallace, receivers); and the Wichita Falls & Northwestern Railway Company, plaintiffs,

v.

UNITED STATES OF AMERICA, DEFENDANT; Interstate Commerce Commission, intervening defendant; and the Kansas City, Mexico & Orient Railroad Company, William T. Kemper, receiver, and Kansas City, Mexico & Orient Railway Company of Texas, interveners.

In Equity. No. 278–N.

3 [Title omitted.]

Bill for injunction.

Filed Sept. 13, 1922.

Plaintiffs in the above-entitled cause, by corporate name hereinafter designated, bring this their bill for injunction against the United States of America and for grounds of relief say:

FIRST.

Abilene & Southern Railway Company is a corporation organized under the laws of the State of Texas.

The Atchison, Topeka & Santa Fe Railway Company is a corporation organized under the laws of the State of Kansas.

The Chicago, Rock Island & Pacific Railway Company is a consolidated corporation organized under the laws of the States of Iowa and Illinois.

The Clinton & Oklahoma Western Railroad Company is a corporation organized under the laws of the State of Oklahoma.

Ft. Worth & Denver City Railway Company is a corporation organized under the laws of the State of Texas.

The Galveston, Harrisburg & San Antonio Railway Company is a corporation organized under the laws of the State of Texas.

Gulf, Colorado & Santa Fe Railway Company is a corporation organized under the laws of the State of Texas.

Midland Valley Railroad Company is a corporation organized under the laws of the State of Arkansas.

Missouri, Kansas & Texas Railway Company of Texas (C. E. Schaff, receiver) is a corporation organized under the laws of the State of Texas.

Missouri Pacific Railroad Company is a corporation organized under the laws of the State of Missouri.

St. Louis-San Francisco Railway Company is a corporation organized under the laws of the State of Missouri.

The Texas & Pacific Railway Company (J. L. Lancaster and Charles L. Wallace, receivers) is a corporation incorporated under act of Congress.

4 The Wichita Falls & Northwestern Railway Company is a corporation incorporated under the laws of Oklahoma.

All of said corporations are common carriers engaged in interstate commerce and each has direct physical connection with one or both of the applicants before the Interstate Commerce Commission as is hereinafter more fully shown.

Each of said plaintiff carriers above named is subject to the act to regulate commerce, commonly called the interstate commerce act, and all other carriers hereinafter referred to have been at all times herein mentioned subject to said act.

SECOND.

The jurisdiction of the court depends upon an act of Congress of October 22, 1913 (38 Stat. L. 219), providing for the institution of suits to suspend or set aside in whole or in part any order of the Interstate Commerce Commission, and upon the application of the Constitution of the United States.

The applicant, the Kansas City, Mexico & Orient Railroad Company (William T. Kemper, receiver), in whose favor the order herein complained of was made, is a corporation created and existing under the laws of the State of Kansas and has its residence and principal place of business at Wichita in the said State in the second division of the district thereof.

THIRD.

1. Plaintiffs allege that on April 3, 1922, upon consideration of an application filed on behalf of The Kansas City, Mexico & Orient Railroad Company (William T. Kemper, receiver) and the Kansas City, Mexico & Orient Railway Company of Texas, the Interstate Commerce Commission entered an order in proceeding No. 13668, entitled "In the Matter of Divisions of Joint Rates, Fares, and Charges on Traffic Interchanged between The Kansas City, Mexico & Orient Railroad Company (William T. Kemper, receiver) and the Kansas City, Mexico & Orient Railway Company of Texas and Their Connections," in which an order of investigation was instituted to inquire into said matter—

"And particularly to determine whether the divisions of joint rates, fares, and charges on traffic interchanged between said applicants and other carriers subject to the interstate commerce act are unjust, unreasonable, inequitable, or unduly preferential or prejudicial within the meaning of paragraph (6) of section 15 of said act."

2. Said order assigned the case for hearing at Washington
5 on May 15, 1922, before C. V. Burnside, an examiner of the said commission, and on the day appointed it was heard by said examiner. Thereafter, on August 9, 1922, the Interstate Commerce Commission entered the following order:

"ORDER.

At a Session of the Interstate Commerce Commission, Division 4, held at its office in Washington, D. C., on the 9th day of August, A. D. 1922.

No. 13668.

IN THE MATTER OF DIVISIONS OF JOINT RATES, FARES, AND CHARGES ON TRAFFIC INTERCHANGED BETWEEN THE KANSAS CITY, MEXICO & ORIENT RAILROAD COMPANY AND THE KANSAS CITY, MEXICO & ORIENT RAILWAY COMPANY OF TEXAS AND THEIR CONNECTIONS.

A hearing and investigation of the matters involved in this proceeding having been had, and said divisions having, on the date

hereof, made and filed a report containing its findings of fact and conclusion thereon, which report is hereby referred to and made a part hereof:

It is ordered, That on and after September 15, 1922, the divisions of interstate joint rates received by Abilene & Southern Railway Company, The Atchison, Topeka & Santa Fe Railway Company, The Chicago, Rock Island & Pacific Railway Company, The Clinton & Oklahoma Western Railway Company, Fort Worth & Denver City Railway Company, The Galveston, Harrisburg & San Antonio Railway Company, Gulf, Colorado & Santa Fe Railway Company, Midland Valley Railroad Company, Missouri, Kansas & Texas Railway Company of Texas and C. E. Shaff, receiver, Missouri Pacific Railroad Company, St. Louis-San Francisco Railway Company, The Texas & Pacific Railway Company and J. L. Lancaster and Charles L. Wallace, receivers, and the Wichita Falls & Northwestern Railway Company, hereinafter termed the connecting lines, on freight traffic interchanged with the Kansas City, Mexico & Orient Railway Company and its receiver, and the Kansas City, Mexico & Orient Railway Company of Texas, and their successors, hereinafter termed the Orient, shall not exceed the following percentages of the divisions accuring on such traffic to said connecting lines, respectively:

Abilene & Southern Railway Company	85 per cent.
The Atchison, Topeka & Santa Fe Railway Company	75 per cent.
The Chicago, Rock Island & Pacific Railway Company	80 per cent.
The Clinton & Oklahoma Western Railway Company	90 per cent.
Fort Worth & Denver City Railway Company	70 per cent.
The Galveston, Harrisburg & San Antonio Railway Company	75 per cent.
Gulf, Colorado & Santa Fe Railway Company	70 per cent.
Midland Valley Railroad Company	80 per cent.
Missouri Kansas & Texas Railway Company of Texas and C. E. Schaff, receiver	80 per cent.
Missouri Pacific Railroad Company	80 per cent.
St. Louis-San Francisco Railway Company	80 per cent.
The Texas & Pacific Railway Company and J. L. Lancaster and Charles L. Wallace, receivers	80 per cent.
The Wichita Falls & Northwestern Railway Company	75 per cent.

It is further ordered, That divisions of joint rates applicable to traffic as to which the Orient is an intermediate carrier shall be adjusted by the connecting lines on relative basis of proportions prescribed above.

It is further ordered, That the several amounts by which the divisions accruing to said connecting lines are reduced under this order shall on and after September 15, 1922, accrue to the said Orient, in addition to the divisions theretofore accruing to said Orient on such traffic.

It is further ordered, That the resulting divisions shall be reduced as far as practicable to two-figure percentages according to the rule prescribed in said report.

6 It is further ordered, That said connecting lines above named, according as they participate in the transportation, be, and they are hereby, notified and required to cease and desist, on and after September 15, 1922, and thereafter to abstain, from asking, demanding, collecting, or receiving divisions of said interstate joint rates with the Orient upon other bases than those above prescribed.

It is further ordered, That said connecting lines, respectively, and the Orient shall jointly report to this commission on or before September 15, 1922, the divisions established under this order, of each of said carriers with respect to freight traffic moving under interstate joint rates between each of the stations or groups of stations for which such divisions are determined; and shall thereafter jointly report the number of tons, ton-miles, and revenue with respect to such traffic actually interchanged for the period from September 15 to December 31, 1922, inclusive, and for the period from January 1 to June 30, 1923, inclusive; said reports for the period from September 15 to December 31, 1922, inclusive, shall be rendered on or before April 1, 1923, and the reports for the period from January 1 to June 30, 1923, inclusive, shall be rendered on or before October 1, 1923.

It is further ordered, That the word "division" as herein used, shall mean the total apportionment of a joint rate, whether determined by percentages, arbitraries, or otherwise.

And it is further ordered, That this order shall continue in force until the further order of the commission.

By the commission, division 4:

[SEAL.] GEORGE B. MCGINTY,
Secretary."

3. Said order was in pursuance of a report of the commission of the same date, which report is attached to this bill as Exhibit A and made a part hereof as fully as though it were set out herein.

4. Plaintiffs allege that the said order of the commission was made without evidence to support it and that the record was entirely bare of any testimony or other proof that the divisions at that time existing between the plaintiffs and the said applicants before the commission were in any way unfair or unreasonable or unduly preferential or prejudicial. Moreover, applicants failed to introduce any evidence to show what would be just, reasonable, and equitable divisions for the future; and therefore the order of the commission prescribing divisions for the future was without evidence to support it. In support of the foregoing allegation plaintiffs will tender at the hearing for the information of the court a copy of the entire record before the Interstate Commerce Commission certified by the secretary of the said commission.

Plaintiffs allege further that there is no evidence in the record upon which the commission could have based the conclusion
7 that one carrier should, without regard to service performed or distance hauled, give up to the applicants 15 per cent of

its revenue accruing under joint through rates while another carrier should give up 25 per cent, and another carrier 20 per cent, and another carrier 10 per cent, and another carrier 30 per cent; and they allege their belief to be that the commission fixed the percentages stated in said order solely upon its assumption that the respective plaintiffs were relatively able financially to bear those proportions of the burden of supporting applicants. Plaintiffs say that the additional burdens thus placed upon them by the order of the commission will aggregate more than $500,000 a year, and that such divisions are in excess of what is just, reasonable, and equitable, and are unduly preferential of applicants and unduly prejudicial to each of these plaintiffs.

5. Plaintiffs allege that the report of the commission (Exhibit A attached hereto) shows that from 1912 to 1921, both inclusive, the railway applicants were unable to earn expenses in all but three years, the deficit in 1919 being $1,246,579.11, and the deficit in 1920 running as high as $1,470,106.97.

6. Plaintiffs allege that the said order of the commission was made arbitrarily and without evidence, for the purpose of giving, out of the revenues of plaintiffs here, financial aid to a railway system which was improvidently built and the construction of which would not be authorized to-day under section 1 (18) of the interstate commerce act, requiring a certificate that present or future public convenience and necessity require or will require the construction of the line.

7. Plaintiffs allege that the system of railways of the applicants, extending from Wichita, Kansas, in a southwesterly direction through Sweetwater, Texas, to Alpine, Texas, was badly conceived, in that it was constructed for a long distance parallel with already existing and strong lines of railway, in that it was constructed through regions not containing and not promising sufficient traffic to justify the construction of a line of railway, in that the line of railway was constructed in general across the main currents of traffic, and in that it is not now earning and never will be able to earn operating expenses.

8. Plaintiffs allege the Orient system as projected never was completed and that it remains stranded as a local line from Wichita southwest across the State of Texas almost to the Mexican boundary. Furthermore, its line from Wichita through Oklahoma closely parallels theretofore existing lines of railway.

9. Plaintiffs allege the fact to be, and that the record so shows, that the present system of applicant lines can not be rendered self-supporting without the addition of capital; and that as it was admitted of record before the commission that the capital can not be obtained, the action of the commission in attempting to support the applicant lines by unjust, unreasonable, and wholly arbitrary divisions was contrary to the evidence, was a misapplication of the law, and was a deprivation of property without due process of law and

a taking of property of plaintiffs for public use without just compensation, in violation of the fifth amendment to the Constitution of the United States.

8 10. Plaintiffs allege that the order of the commission is unlawful and arbitrary because it is directed against only the immediate connecting lines of applicants and that other connections participating in the revenue from joint through rates were not made parties to the proceeding. Such carriers are not subject to the order and will not therefore suffer any diminution of their revenues. Plaintiffs say that the commission is without jurisdiction to make an order respecting the divisions of joint through rates without the presence as parties of every carrier participating in the hauls thereunder, unless the order affect equally all carriers earning a part of the revenue so divided. Plaintiffs allege further that at the time of the hearing of this proceeding and now each of them participated and participates in joint through rates published and on file with the Interstate Commerce Commission and concurred in by other carriers, and under which a large volume of freight traffic moves and is interchanged between these plaintiffs and the said applicants, the divisions of which joint through rates as to these plaintiffs only were affected by the said order of the commission, because said participating carriers were not made parties to the proceeding, the result being that these plaintiffs are required and compelled by the said order of the commission to contribute and pay over to the said two applicants the respective percentages of their revenues earned on such shipments so moving as are hereinbefore set forth, although the other said lines, parties to the said through joint rates and handling such joint through shipments, are not required or compelled to contribute anything to said applicants or to share with these plaintiffs in the diminution of their revenues under the said order of the said commission.

11. Plaintiffs further allege that the said order of the commission will result in requiring competing lines to accept different earnings for substantially the same service and haul between the same points and will result in destroying uniformity of divisions on traffic interchanged by different connections of the applicants; that the said order is shown to be and is wholly arbitrary in this, that there is open for the movement of traffic, and freight traffic does move, between junction points of these plaintiffs, respectively, and the said two applicants and the great commercial centers of the country, such as Kansas City, St. Louis, and Chicago, and that under the said order of the commission shipments may move over the line or lines of these plaintiffs, or at least some of them, thereby producing the specified shrink in plaintiff's revenues, as is shown by said opinion and order of the commission, and yet at the same time such shipments may move over said lines not parties to said order with the result that these plaintiffs will receive far less revenue because of

said order than will be received by said other carriers not parties to said order for the transportation of freight between substantially the same points and hauled under substantially the same conditions.

9 12. Plaintiffs allege that sheet 6 and other parts of the report of the commission (Exhibit A hereto) were constructed by the commission from matter which was not submitted in evidence before the commission, which plaintiffs did not know was to be used, upon which they had no opportunity to cross-examine, and which matter was considered and treated by the commission, as shown by its report, as relevant and material.

13. Plaintiffs allege that in many if not all instances the division of the rate awarded to them by the commission would not yield them in revenue the cost of operation for the respective services rendered, not to mention a reasonable return on their investments; and they say further that few if any of them are earning the 5.75 per cent which the Interstate Commerce Commission found to be a reasonable return under the law in a case decided May 16, 1922, entitled Reduced Rates, 1922, No. 13293, 68 I. C. C. 676, page 734, involving all the carriers in the United States.

14. Plaintiffs allege that in the decision of this case the commission, as is manifest from the facts herein alleged and upon the face of the report and order of the commission, misconceived the meaning of and misapplied section 15 (6) of the interstate commerce act, and that such misapplication of said section will result in a denial to plaintiffs of the rights guaranteed to them by the fifth amendment of the Constitution of the United States.

15. Plaintiffs allege that the applicants before the Interstate Commerce Commission are wholly insolvent and unable to respond in damages or to make refunder of any of the divisions which would come into their possession should the said order of the Interstate Commerce Commission take effect, and later be judicially held to have been unlawfully entered. The said order of the Interstate Commerce Commission has been made to take effect on September 15, 1922, and unless it be suspended or set aside by an order of this court it will work irreparable damage to each and all of plaintiffs.

FOURTH.

Wherefore, plaintiffs pray that upon the filing and presentation of this bill a temporary stay or suspension of the operation of the order of the Interstate Commerce Commission be made by the court after a notice of three days to the Interstate Commerce Commission and the Attorney General of the United States, because of the irreparable damage which will result to the plaintiffs unless such suspension be made, and that the commission be restrained from taking any steps or instituting any proceedings to enforce the said order; that upon hearing of this cause a decree be entered setting aside and

annulling said order of the Interstate Commerce Commission and perpetually enjoining the enforcement of said order; and that the plaintiffs have such other and further relief as to the court may seem meet.

10 Plaintiffs further pray that in case it should be impossible to convene a three-judge court before September 15, an order be entered by the court under section 208 of the Judicial Code restraining and suspending the said order of the commission pending the final hearing and determination of this suit.

J. M. WAGSTAFF,
W. R. SMITH,
T. J. NORTON,
W. F. DICKINSON,
LUTHER BURNS,
ORVILLE BULLINGTON,
KENNETH F. BURGESS,
J. H. BARWISE, JR.,
FRED H. WOOD,
GARDINER LATHROP,
O. E. SWAN,
C. S. BURG,
W. W. BROWN,
C. C. HUFF,
H. H. LARIMORE,
W. P. WAGGENER,
W. F. EVANS,
M. G. ROBERTS,
R. R. VERMILION,
GEORGE THOMPSON,
J. M. BRYSON,
Solicitors for all Plaintiffs.

[Jurat showing the foregoing was duly sworn to by C. C. Dana omitted in printing.]

11 *Exhibit A to bill for injunction.*

Interstate Commerce Commission.

No. 13668.

Kansas City, Mexico & Orient Divisions.

IN THE MATTER OF DIVISIONS OF JOINT RATES, FARES, AND CHARGES ON TRAFFIC INTERCHANGED BETWEEN THE KANSAS CITY, MEXICO & ORIENT RAILROAD COMPANY AND THE KANSAS CITY, MEXICO & ORIENT RAILWAY COMPANY OF TEXAS AND THEIR CONNECTIONS.

Submitted May 16, 1922. Decided August 9, 1922.

Division of joint rates on traffic interchanged between the Kansas City, Mexico & Orient lines and their connections found to be unjust, unreasonable, and inequitable. Just, reasonable, and equitable divisions prescribed.

E. A. Boyd for Kansas City, Mexico & Orient Railroad Company and its receiver, and Kansas City, Mexico & Orient Railway Company of Texas.

Fred H. Wood and J. R. Bell for Galveston, Harrisburg & San Antonio Railway Company, Texas & New Orleans Railroad Company, Houston & Texas Central Railroad Company, Houston East

& West Texas Railway Company, Houston & Sherveport Railroad Company, Pacific Electric Railway Company, and Southern Pacific Company.

John H. Carroll and T. P. Littlepage for Fort Worth & Denver City Railway Company, Wichita Valley Railway Company, and Trinity & Brazos Valley Railway Company.

M. G. Roberts for St. Louis-San Francisco Railway Company.

C. S. Burg for receivers of Missouri, Kansas & Texas Railway Company, Missouri, Kansas & Texas Railway Company of Texas, and Wichita Falls & Northwestern Railway Company.

F. E. Andrews for Atchison, Topeka & Santa Fe Railway Company, Gulf, Colorado & Santa Fe Railway Company, and Panhandle & Santa Fe Railway Company.

H. G. Herbel for Missouri Pacific Railroad Company.

A. B. Enoch and T. P. Littlepage for Chicago, Rock Island & Pacific Railway Company and Chicago, Rock Island & Gulf Railway Company.

Robert Thompson for receivers of Texas & Pacific Railway Company.

12 Report of the Commission.

Division 4, Commissioners Meyer, Aitchison, Potter, and Cox.

By Division 4:

Upon the filing of a joint application by the receiver of the Kansas City, Mexico & Orient Railroad Company and by the Kansas City, Mexico & Orient Railway Company of Texas, hereinafter referred to together as the Orient, we instituted, by our order of April 3, 1922, an investigation into the divisions of joint rates, fares, and charges on traffic interchanged between those carriers and their connections. Forty carriers were named as respondents, comprising all of the principal lines serving the territory west and southwest of Chicago. The evidence was confined to the divisions of joint freight rates, and this report will be similarly limited.

The Orient alleges that its revenues are insufficient to enable it to pay operating expenses, taxes, and a fair return on the property held for and used in transportation service, or to enable it to perform properly its function as a common carrier, and contends that this condition can be remedied only by increasing its divisions of joint freight rates, or by increasing, through changes in routing, the amount of traffic it handles as an intermediate carrier. The request for changes in routing of traffic is before us in a separate proceeding.

The present line of the Orient in the United States extends from Wichita, Kans., to Alpine, Tex., a distance of 737 miles. The original plans called for construction of a line from Kansas City, Mo., to the Pacific coast at Topolobampo Bay, Mexico, with a

branch line from San Angelo to Del Rio, Tex. Construction in this country commenced at Anthony, Kans., in 1902, and the line from Wichita to Anthony was completed in 1913. The branch line has been graded from San Angelo to Sonora, Tex., and some grading has been done on the line from Wichita to Kansas City. Construction of the line in Mexico was commenced in 1901 and has been completed in parts. The line is in operation from Topolobampo Bay to Fuerte, from Sanchez to Minaca, and from Chihuahua to Marquez. Trackage rights have been secured over the Mexico Northwestern from Minaca to Chihuahua. Construction of the Mexican line was suspended in 1908 owing to revolutionary conditions in Mexico. That line, however, is not involved in this proceeding, which concerns only the mileage in the United States.

The principal connections of the Orient, as shown by its application, are as follows:

13 Connecting line.	Points of connection.
Missouri Pacific.	Wichita & Anthony, Kans.
Chicago, Rock Island & Pacific.	Wichita and Anthony, Kans., and Clinton, Okla.
Atchison, Topeka & Santa Fe.	Wichita and Anthony, Kans.
St. Louis-San Francisco.	Wichita, Kans., Clinton and Altus, Okla.
Midland Valley.	Wichita, Kans.
Clinton & Oklahoma Western.	Clinton, Okla.
Wichita Falls & Northwestern.	Altus, Okla.
Fort Worth & Denver City.	Chillicothe, Tex.
Missouri, Kansas & Texas of Texas.	Hamlin, Tex.
Abilene & Southern.	Hamlin, Tex.
Texas & Pacific.	Sweetwater, Tex.
Gulf, Colorado & Santa Fe.	Sweetwater and San Angelo, Tex.
Galveston, Harrisburg & San Antonio.	Alpine, Tex.

The Kansas City, Mexico & Orient Railway Company was organized May 1, 1900. The corporation commenced operation of 75 miles of the line in Kansas and Oklahoma in 1903 and the mileage in operation was increased from year to year. The property passed into the hands of receivers on March 7, 1912. The Kansas City, Mexico & Orient Railroad Company was organized July 6, 1914, to purchase the property of the original company, which was sold under foreclosure. A receiver for the latter company was appointed on April 16, 1917, and the property is now being operated by him. The investment in road and equipment, less depreciation, as of December 31, 1921, is reported as $21,969,730.31. The Kansas City, Mexico & Orient Railway Company of Texas was organized July 5, 1899, and construction was carried on concurrently with that of the lines in Kansas and Oklahoma. This company is not included in the receivership, but the receiver of the former company is also president of the latter. The investment in road and equipment of the Texas Company, less depreciation, as of December 31, 1921, is reported as $6,878,360.62, the total for both companies being $28,848,090.93.

The following tabulation shows the railway operating income or deficit of the Orient system in the United States by years from 1912 to 1921, inclusive:

Year.	Income.	Deficit.
Year ended June 30, 1912		$143,560.55
Year ended June 30, 1913	$99,497.12	
Year ended June 30, 1914		372,350.82
Year ended June 30, 1915	93,845.02	
Year ended June 30, 1916	90,788.13	
Year ended Dec. 31, 1917		45,446.07
Year ended Dec. 31, 1918		695,848.82
Year ended Dec. 31, 1919		1,246,579.11
Year ended Dec. 31, 1920		1,470,106.97
Year ended Dec. 31, 1921		860,740.81

The above figures include no charges on account of interest; taxes, however, are included.

14 In making its plea for increases in divisions and changes in routing of traffic, the Orient asks only a sufficient measure of relief to enable it to continue operation and makes no request for a return upon investment. The enormous increase in deficits commencing with the year 1918 is apparently due both to decreased revenues and largely increased expenses. It is claimed that the loss of revenue during the period of Federal control was largely due to changes in the routing of through traffic, and that since the termination of Federal control the former conditions have not been restored. The record indicates that a substantial proportion of the through traffic of the Orient was received from the Southern Pacific and that this carrier reduced its deliveries on account of alleged unsatisfactory service of the Orient. That the unfavorable operating results continue in the current year is indicated by the following statement of railway operating income for the first four months of 1922, taken from monthly reports on file with us:

January	$105,289.00 deficit
February	59,432.00 deficit
March	59,346.00 deficit
April	116,539.00 deficit

Under the provisions of paragraph (6) of section 15 of the interstate commerce act the scope of our powers and duties in prescribing divisions of joint rates between carriers has been amplified. The statute provides that:

"In so prescribing and determining the divisions of joint rates, fares and charges, the commission shall give due consideration, among other things, to the efficiency with which the carriers concerned are operated, the amount of revenue required to pay their respective operating expenses, taxes, and a fair return on their railway property held for and used in the service of transportation, and the importance to the public of the transportation services of such carriers and also whether any particular participating carrier is an originating, intermediate, or delivering line, and any other fact or

circumstance which would ordinarily, without regard to the mileage haul, entitle one carrier to a greater or less proportion than another carrier of the joint rate, fare or charge."

This provision has been considered by us heretofore. Pittsburgh & W. Va. Ry. Co. v. P. & L. E. R. R. Co., 61 I. C. C. 272; New England Divisions, 66 I. C. C 196; Divisions of Joint Rates and Fares of M. & N. A. R. R. Co., 68 I. C. C. 47.

IMPORTANCE TO THE PUBLIC OF THE TRANSPORTATION SERVICE.

The Orient extends in a general southwesterly direction from Wichita through Oklahoma into Texas, terminating at Alpine, where it connects with the Galveston, Harrisburg & San Antonio, a part of the Southern Pacific system. The principal products originating on the line are livestock, cotton and grain, and other products of agriculture. The road operates through 4 counties in Kansas, 8 in Oklahoma, and 16 in Texas, serving 13 county seats, of which 5 are served exclusively. It is estimated that an area of about 23,272 square miles, with a population of approximately 500,000, is served by this carrier, and the property value, exclusive of cities and towns, is placed at $204,250,000. Between Wichita and Altus, Okla., there are grain elevators at all stations, and in southern Oklahoma there are several cotton gins. A cement plaster mill at Hamlin, Texas, is served exclusively by the Orient. There are no mining or lumbering activities along the line, as a result of which the Orient is under the necessity of purchasing all of its coal and ties at points off its lines, resulting in increased expense on these items.

During the period 1917 to 1921, inclusive, traffic was handled by the Orient as follows:

Year.	Revenue freight originating on road.	Revenue freight from connecting carriers.	Total revenue carried, freight.
	Tons.	*Tons.*	*Tons.*
1917	356,593	831,128	1,187,721
1918	277,123	880,423	1,157,546
1919	335,143	917,492	1,312,635
1920	521,897	904,896	1,426,793
1921	471,324	910,430	1,381,754

The Orient is not primarily an originating carrier, but a large proportion of its freight tonnage is handled as an intermediate carrier. The figures for 1921, on basis of ton miles, are as follows:

	Ton-mile.
Originating on Orient	57,020,117
Delivered on Orient	39,331,668
Intermediate	89,058,723

In our original report on the application of the Orient under section 210 of the transportation act, 1920, Finance Docket No. 3, we said:

"It is not disputed that the Orient system, or at least that part which lies within the United States, is of essential importance in meeting the transportation needs of the public in the territory which it serves."

Nothing appears of record in the present case to justify any different conclusion.

REVENUE REQUIRED TO PAY OPERATING EXPENSES, TAXES, AND A FAIR RETURN ON THE CARRIER PROPERTY.

The deficits in railway operating income for the years ended December 31, 1920, and 1921, have already been shown as $1,407,106.97 and $860,740.81, respectively. According to the estimate of the Orient, the deficit for 1922 will amount to $1,590,213. For the year ended December 31, 1920, interest was accrued amounting to $311,526.65, of which only $17,622.95 was paid. For the year ended December 31, 1921, interest accruals amounted to $514,665.32, of which $150,000 was paid, this payment being applicable to a loan of $2,500,000 to the receiver of the Kansas City, Mexico & Orient Railroad Company under section 210 of the transportation act, 1920.

16 No allegation of inefficient operation appears in the record against the Orient or any of the respondent connecting lines. Various methods of increasing its revenues have been suggested. Application has been made to the Railroad Labor Board for authority to reduce wages and change rules which, if granted, will result in an estimated saving of about $325,000. Increase in all rates is not considered feasible for the reason that it is believed that sufficient tonnage would be given to competing lines by the shippers to offset any increase in revenues from higher rates, and for the further reason that shippers on the Orient could not compete with shippers on other lines in the same territory. However, this matter has been and is receiving consideration.

Increasing the volume of traffic handled by the Orient would automatically increase its revenues and we believe this can be accomplished by designating its lines a "differential route" on certain commodities. For instance, a differential of 1 per cent per 100 pounds under the established rate on grain destined to Gulf ports should attract a considerable volume of tonnage to the Orient. This question should be made the subject of conferences between the Orient and its connections, and the necessary steps should be taken to accomplish this object. We are advised that five of the connecting lines are favorable to the adoption of a plan of differentials.

In Divisions of Joint Rates and Fares of M. & N. A. R. R. Co., supra, we said:

"The law in its present form requires that we give due consideration, among other things, to the revenue needs of carriers partici-

pating in joint rates to enable them to pay operating expenses, taxes, and a fair return on the value of their carrier property used in the transportation service as well as to all other facts or circumstances which, without regard to the mileage haul, entitle one carrier to a greater or less proportion of a joint rate than is received by others.

"In comparing the revenue needs of the Missouri & North Arkansas and its connections we have made use of various units derived in a uniform manner. For example, to secure unit comparisons embracing all revenues and all expenses we have adopted for use in some comparisons the 'equated ton-mile,' derived by adding to the freight ton-miles three times the passenger-miles, the ratio between freight revenue per ton-mile and passenger revenues per passenger-mile in that territory being approximately as one to three. We have also aggregated all transportation service car-miles. It is, of course, understood that the reduction of gross earnings or expenses to units of this character does not produce absolutely correct results, but where the same method is used in all cases, the results afford a reasonable basis for comparison."

The same general method of comparison has been followed in this case, as shown by the following statement:

COMPARISON OF UNIT REVENUES, AND RETURN FOR YEAR ENDED DECEMBER 31, 1921.

	K. C., M. & O. and K. C. M. & O., of Texas.	Abilene & Southern Ry.	Atchison, Topeka & Santa Fe Ry.	Chicago, Rock Island & Pacific.	Clinton, Okla. & Western Ry.	Fort Worth & Denver City Ry.	Galveston, Harrisburg & San Antonio.	Gulf, Colorado & Santa Fe Ry.	Midland Valley R. R.	Missouri, Kansas & Texas Ry. of Texas.	Missouri Pacific R. R.	St. Louis-San Francisco Ry.	Texas & Pacific R. R.	Wichita Falls & Northwestern R. R.
Gross revenues:														
Per equated ton-mile.cents..	1.784	4.938	1.587	1.422	4.933	1.494	1.447	1.264	1.831	1.529	1.354	1.582	1.656	2.772
Per car-mile..... "	21.440	66.779	21.963	21.608	68.620	26.611	22.053	21.241	31.722	23.392	20.978	26.702	25.542	38.921
Per train-mile..... "	340.	472.	515.	413.	554.	603.	497.	531.	477.	441.	456.	443.	511.	460.
Operation expenses:														
Per equated ton-mile.cents..	1.991	3.429	1.097	1.157	4.060	.990	1.264	.925	1.398	1.225	1.131	1.163	1.402	1.846
Per car-mile..... "	23.933	46.373	15.179	17.574	56.482	17.637	19.267	15.536	24.216	18.742	17.521	19.631	21.623	25.911
Per train-mile..... "	379.	328.	356.	336.	456.	400.	434.	388.	364.	353.	381.	325.	432.	307.
Net revenues:														
Per equated ton-mile.cents..	.207‡	1.509	.490	.265	.873	.504	.183	.340	.433	.304	.223	.419	.254	.927
Per car-mile..... "	2.493‡	20.406	6.784	4.033	12.138	8.975	2.786	5.705	7.506	4.649	3.457	7.071	3.919	13.010
Per train-mile..... "	39.	144.	159.	77.	98.	203.	63.	143.	113.	88.	75.	118.	79.	154.
Net railway operating income:														
Per equated ton-mile.cents..	.361‡	.737	.388	.164	.364	.456	.086	.275	.382	.117	.127	.346	.132	.489
Per car-mile..... "	4.336‡	9.966	5.372	2.495	5.064	8.123	1.317	4.627	6.614	1.788	1.965	5.836	2.039	6.868
Per train-mile..... "	69. ‡	70.	126.	48.	41.	184.	30.	116.	99.	34.	43.	97.	41.	81.
Return per $1,000.00 invest.:														
Gross revenue.....dollars..	136.95	274.09	256.11	367.15	188.58	397.35	314.96	492.61	223.41	447.23	289.64	218.25	283.43	368.61
Net revenue..... "	15.92‡	85.76	79.11	68.53	33.36	134.01	39.79	132.31	52.86	88.90	47.73	57.79	43.49	123.21
Ry. operat. income.... "	27.70‡	40.90	62.65	42.39	13.92	121.29	18.81	107.31	46.58	34.19	27.13	47.70	22.63	65.05
Rate, per centum:														
Gross revenue.....per cent..	13.70	27.41	25.61	36.72	18.86	39.74	31.50	49.26	22.34	44.72	28.96	21.83	28.34	36.86
Net revenue..... "	1.59‡	8.38	7.91	6.85	3.34	13.40	3.98	13.23	5.29	8.89	4.77	5.78	4.35	12.32
Ry. oper. inc..... "	2.77‡	4.09	6.27	4.24	1.39	12.13	1.88	10.73	4.66	3.42	2.71	4.77	2.26	6.51

‡ Denotes red figures.

The gross revenue of the Orient per equated ton-mile is greater than that of nine of its connections, and its earnings per car-mile are substantially smaller than eleven of the thirteen connections, while the earnings per train-mile are in each instance materially less, thus evidencing a smaller and less profitable train and car load, the usual incident of a light traffic. The operating expenses per equated ton-mile are greater than those of any connection except two small roads, namely: Abilene & Southern and the Clinton & Oklahoma Western, and its expenses per car-mile are substantially greater than those of the nine larger roads, while the expenses per train-mile are in six instances materially less. The general result is that while the Orient sustained a deficit in its net railway operating income of sixty-nine cents per train-mile, all of its connections received incomes ranging from thirty cents per train-mile in the case of the Galveston, Harrisburg & San Antonio to $1.84 per train-mile in the case of the Fort Worth & Denver City.

In other calculations the results as distinguished between freight and passenger traffic have been separately considered based upon an allocation in accordance with our plan to include all operating revenue accounts. The operating ratios of the carriers concerned in respect of all revenue received show that the freight operating ratio is less than the passenger operating ratio with exception of the Atchison, Topeka & Santa Fe, Fort Worth & Denver City, St. Louis-San Francisco, and the Texas & Pacific, for which the freight ratio is higher. In the case of the Fort Worth & Denver City, Missouri, Kansas & Texas of Texas, and Midland Valley, the two ratios are substantially equal, which is also true of the combined result of the eleven major roads used in the calculations. It also appears that the freight ratio of the Orient (1.0791) is approximately 141 per cent of the average freight ratio of the other connecting lines
18 (0.7663) while the passenger ratio of 1.3518 is approximately 175 per cent of the average passenger ratio of (0.7718) the eleven major connections.

The disparity of 41 per cent in the case of freight service and 75 per cent in the case of passenger service would seem to indicate that the passenger fares and freight rates and divisions accorded this carrier are not sufficient to meet even the maintenance, traffic, transportation, and general expenses properly to be charged against either the freight or passenger traffic, to say nothing of taxes, equipment rental, and a fair return on the property investment used in the service. As stated above, however, the Orient is seeking only such revenue as will enable it to operate the road and is asking nothing for its security holders.

It is alleged that in many instances where divisions have been established by its connections on an arbitrary basis, these connections have declined to shrink their arbitraries when the through rates have been reduced.

In Increased Rates, 1920, 58 I. C. C. 220, we authorized certain percentage increases in order to permit a return of 6 per cent on the

aggregate value of carrier property held for and used in the service of transportation within the boundaries of each rate-making group, under normal traffic conditions. In Reduced Rates, 1922, 68 I. C. C. 676, we found that 5¾ per cent on the aggregate value of such property would constitute a fair return after March 1, 1922. It is apparent, however, that the Orient has not received and is not receiving the share of the revenue within the group in which it is included to which it is properly entitled on basis of the amount and character of service performed.

CONCLUSION.

Other than filing statements containing information called for in our order, the respondents submitted no evidence at the hearing of this case.

Upon the facts of record, we find that the divisions of interstate joint freight rates on traffic interchanged between the Orient and its immediate connections are unjust, unreasonable, and inequitable, and that for the future in respect of traffic originating or terminating on the Orient just, reasonable, and equitable divisions of such joint rates accruing to each of the connecting lines should, on the average, not exceed the following percentages of such divisions:

Abilene & Southern	85 per cent.
Atchison, Topeka & Santa Fe	75 per cent.
Chicago, Rock Island & Pacific	80 per cent.
Clinton & Oklahoma Western	90 per cent.
Fort Worth & Denver City	70 per cent.
Galveston, Harrisburg & San Antonio	75 per cent.
Gulf, Colorado & Santa Fe	70 per cent.
Midland Valley	80 per cent.
Missouri, Kansas & Texas of Texas	80 per cent.
Missouri Pacific	80 per cent.
St. Louis-San Francisco	80 per cent.
Texas & Pacific	80 per cent.
Wichita Falls & Northwestern	75 per cent.

19 There are prescribed herein as the just, reasonable, and equitable divisions to be observed on and after September 15, 1922, divisions constructed substantially according to the following rules:

Considering separately the several divisions of interstate rates on freight interchanged between the Orient and its connections and having origin or destination on the Orient, there shall be deducted from the revenue or proportion accruing under divisions to said connections, whether determined upon arbitraries or percentages or in any other manner, the percentages hereinafter indicated of the totals of such revenue or proportions creditable to freight revenue, account No. 101, of such connections respectively; and the amounts so deducted from the revenues or proportions of its connections shall be added to the revenue or proportions of the Orient, to wit:

Abilene & Southern	15 per cent.
Atchison, Topeka & Santa Fe	25 per cent.
Chicago, Rock Island & Pacific	20 per cent.
Clinton & Oklahoma Western	10 per cent.
Fort Worth & Denver City	30 per cent.
Galveston, Harrisburg & San Antonio	25 per cent.

Gulf, Colorado & Santa Fe	30 per cent.
Midland Valley	20 per cent.
Missouri, Kansas & Texas of Texas	20 per cent.
Missouri Pacific	20 per cent.
St. Louis-San Francisco	20 per cent.
Texas & Pacific	20 per cent.
Wichita Falls & Northwestern	25 per cent.

Divisions of joint rates applicable to traffic as to which the Orient is an intermediate carrier will be adjusted by the immediate connections on relative basis of proportions prescribed above.

When the amounts of revenue accruing to the Orient and to its several connections out of the respective rates are thus determined, these revenues will in total be respectively represented so far as practicable by two-figure percentages: that is, expressed in respect of the proportion accruing to any line in full hundredth parts of the total to be divided and applied for the future so far as practicable to the total revenue accruing from freight rates between stations or groups of stations on the Orient and its immediate connections.

In cases where because of inconsistencies in present divisions, because the increased divisions accruing to the Orient may exceed local rates, or for other reasons, the divisions resulting from the above rules may in special instances be found to be inequitable, inconsistent, or otherwise unreasonable, the parties will be expected to make such adjustments as will effect substantially the general results prescribed and to report their action to us. Carriers for which rates of
20 reduction of divisions are prescribed lower than are prescribed for their competitors on competitive business to or from the Orient may voluntarily meet the greater reduction in divisions prescribed for their competitors. If it shall be found that in special instances the divisions herein prescribed operate unjustly, inequitably, or otherwise unreasonably to the injury of any carrier participating in a joint rate with the Orient, such situations may be called to our attention by appropriate proceedings and we will afford such relief as we may find warranted.

The Orient and each of its connections respectively shall jointly report to us on or before September 15, 1922, the divisions established according to the foregoing rules, and shall thereafter jointly report the results of the application of these divisions to business actually interchanged in the year 1922, to December 31, and from January 1 to June 30, 1923, inclusive, with a showing of tons and of ton-miles and revenue for each carrier between stations or groups of stations as the case may be. The reports for the period ending December 31, 1922, shall be rendered on or before April 1, 1923, and the reports for the six months ending June 30, 1923, shall be rendered on or before October 1, 1923, and jurisdiction is retained to adjust on basis of such reports the divisions herein prescribed or stated if such adjustment shall to us seem proper.

At a conference of representatives of the States in which the Orient operates, and of connecting carriers, held since this case has been submitted, the official delegate from Texas stated that a large

number of counties in his State had expressed their willingness to assess the Orient for taxation purposes at the nominal value of $100 per mile. We believe that the other States should follow the lead of Texas in this respect; in fact, complete exemption from all taxes until the Orient can earn something is demanded in the public interest. We earnestly recommend this course to the respective State authorities.

It should also be stated that through the proper channels steps have been taken to route Government freight over the Orient as far as practicable.

An appropriate order will issue.

[File endorsement omitted.]

21 In United States District Court.

Motion of the United States to dismiss the bill of complaint.

Filed Sept. 30, 1922.

The United States of America, by its counsel, now comes and moves the court to dismiss the bill of complaint in the above-entitled cause for that the said bill of complaint is without equity on its face; and the bill of complaint and the exhibits attached thereto and made a part thereof do not state any cause of action against the defendant and the plaintiffs are not entitled to the relief prayed or any part of the same.

BLACKBURN ESTERLINE,
Assistant to the Solicitor General.

[File endorsement omitted.]

22 In United States District Court.

Motion to dismiss.

Filed Oct. 9, 1922.

Now comes the Interstate Commerce Commission, intervening defendant, which for convenience will be referred to hereinafter as the commission, and moves the court to dismiss the bill of complaint herein for want of equity, saying in support of its motion:

That the report in Kansas City, Mexico & Orient Divisions, No. 13668, which is attached to the bill as Exhibit A, and the order dated August 9, 1922, made in pursuance of said report, set forth in the "third" section, paragraph 2, of the bill, which said order the bill of complaint seeks to suspend, enjoin, and set aside, were made and entered by division 4 of the commission, as appears upon the face of the bill; that at the time said order and report were made and entered, division 4 of the commission was composed of four commissioners, as shown by said report; that the commission was then and

is now composed of eleven commissioners; that said order of division 4 of the commission is subject to reversal, change, or modification by the full commission upon rehearing by the full commission, and is subject to stay or suspension by the full commission pending such rehearing; that plaintiffs herein have a statutory right to make application for such rehearing by the full commission (section 16 (a) and section 17 (4) of the interstate commerce act); that the bill does not show that plaintiffs have applied for a rehearing of said cause by the full commission, or have applied to the full commission to stay or suspend said order of division 4 of the commission and, therefore, plaintiffs have not exhausted their remedies before the commission, the case has not reached a justiciable stage, and the bill is premature and should be dismissed.

23 IN UNITED STATES DISTRICT COURT.

Answer of Interstate Commerce Commission.

Filed Oct. 9, 1922.

The commission without waiving its objection to the sufficiency of the bill, stated in its motion to dismiss, and now and at all times hereafter saving and reserving to itself all and all manner of benefit and advantage of exception to the many errors and insufficiencies in the bill contained, answers and says:

I.

Answering the "first" section of the bill, the commission admits that the allegations of fact contained therein are true.

II.

Answering the "second" section of the bill, the commission admits that the allegations of fact contained therein are true.

III.

1. Answering paragraph 1 of the "third" section of the bill, the commission admits that the allegations of fact contained therein are true.

2. Answering paragraph 2 of the "third" section of the bill, the commission admits that the allegations of fact contained therein are true, and the commission alleges that division 4 of the commission, by order entered on the 14th day of September, 1922, postponed until October 2, 1922, the effective date of its order of August 9, 1922.

3. Answering paragraph 3 of the "third" section of the bill, the commission admits that the allegations of fact contained therein are true.

4. Answering paragraph 4 of the "third" section of the bill, the commission denies that the order therein referred to was
24 made without evidence to support it, and alleges that the record contained evidence which fully supports said order; denies that the record does not contain testimony or other proof that the divisions of joint rates, at that time existing between plaintiffs and applicants, were unfair or unreasonable or unduly preferential or prejudicial, and alleges that the record does contain such testimony and other proof; and denies that the record contains no evidence to show what would be just, reasonable, and equitable divisions of joint rates for the future and alleges that the record does contain such evidence.

Answering further, the commission denies that the conclusion in said report that applicants' divisions of joint rates with one connecting carrier should be increased by 15 per cent of the divisions then accruing to said connecting carrier, that applicants' divisions of joint rates with another connecting carrier should be increased by 25 per cent of the divisions then accruing to such connecting carrier, that applicants' divisions of joint rates with another connecting carrier should be increased by 20 per cent of the divisions then accruing to such connecting carrier, that applicants' divisions of joint rates with another connecting carrier should be increased by 10 per cent of the divisions then accruing to such connecting carrier, and that applicant's divisions of joint rates with another connecting carrier should be increased by 30 per cent of the divisions then accruing to such connecting carrier was made arbitrarily or without regard for the services performed or the distance hauled or without evidence to support it.

The commision denies that the percentage divisions in said order were fixed solely upon an assumption that the respective plaintiffs were able financially to bear those proportions of the burden of supporting applicants and alleges that in prescribing and determining said divisions, due consideration and weight were given, among other things, to the efficiency with which the carriers concerned are operated, the amount of revenue required to pay their respective operating expenses, taxes, and a fair return on their
25 railway property held for and used in the service of transportation, and the importance to the public of the transportation services of such carriers and also whether any particular participating carrier is an originating, intermediate, or delivering line, and all other facts or circumstances which would ordinarily, without regard to the mileage haul, entitle one carrier to a greater or less proportion than another carrier of the joint rate, and to all other factors expressed or implied in the interstate commerce act.

The commission denies further that the divisions are in excess of what is just, reasonable, and equitable, or are unduly preferential of applicants, or either of them, or unduly prejudicial to plaintiffs, or any of them.

5. Answering paragraph 5 of the "third" section of the bill, the commission refers to the report mentioned therein, as showing the contents thereof.

6. Answering paragraph 6 of the "third" section, the commission denies that the order was made arbitrarily or without evidence for the purpose of giving financial aid to applicants out of revenues of the plaintiffs, and alleges that the purpose of the order was to fix just, reasonable, and equitable divisions of joint rates between the applicants and plaintiffs. As to whether the railway system of applicants was improvidently built or whether its construction would not be authorized to-day under section 1, paragraph (18), of the interstate commerce act, the commission is without knowledge or information sufficient to enable it to form a belief and therefore denies the same. In this connection the commission says that plaintiffs' allegations concerning these matters are purely conjectural and are not to be taken as allegations of fact.

7. Answering paragraph 7 of the "third" section of the bill, the commission admits that applicants were not at the time of the hearing earning operating expenses and denies all other allegations of fact contained therein. In further answer, the commis-
26 sion alleges that the railway lines which serve the same territory served by a part of the railway line of applicants were for the most part constructed subsequent to the construction of the line of applicants and alleges further that the railway line of applicants for long distances serves important territory and the people living therein, not served by any other line of railway and entirely dependent upon applicants for railroad transportation.

8. Answering paragraph 8 of the "third" section of the bill, the commission admits that the Orient system, as projected, has not been completed; that the railway line of applicants now extends from Wichita, Kans., southwest to Alpine, Texas, near the Mexican border; denies all other allegations of fact contained therein and in this connection refers to its answer to paragraph 7 of the "third" section of the bill.

9. Answering paragraph 9 of the "third" section of the bill, the commission points out that the allegations contained therein are largely conclusions of law which require no answer. The commission denies the allegations of fact contained therein except that it admits and alleges that witnesses for applicants testified at the hearing that additional capital could not be obtained by applicants at that time.

10. Answering paragraph 10 of the "third" section of the bill, the commission denies that the order is unlawful or arbitrary because it is directed only against the immediate connecting lines of applicants, and denies all other allegations of fact contained therein except that the commission admits that carriers other than plaintiffs were, at the time of the hearing, parties to the joint rates here involved and admits that traffic moves on such joint rates. The commission refers to the order as itself showing its effect and purport.

11. Answering paragraph 11 of the "third" section of the bill, the commission refers to the order as itself showing its effect and purport, and in connection with the allegations in said paragraph "that the said order of the commission will result in requiring com-
27 peting lines to accept different earnings for substantially the same service and haul between the same points and will result in destroying uniformity of divisions on traffic interchanged by different connections of applicants," the commission calls attention to the following language in the report, which is made a part of the order:

"Carriers for which rates of reduction of divisions are prescribed lower than are prescribed for their competitors on competitive business to or from the Orient may voluntarily meet the greater reduction in divisions prescribed for their competitors. If it shall be found that in special instances the divisions herein prescribed operate unjustly, inequitably, or otherwise unreasonably to the injury of any carrier participating in a joint rate with the Orient, such situations may be called to our attention by appropriate proceedings and we will afford such relief as we may find warranted."

The commission admits that traffic moves between junction points of applicants and plaintiffs and Kansas City, St. Louis, and Chicago, and that such traffic may move over the line or lines of these plaintiffs, or some of them, for the entire distance, or may move in part over the line or lines of one or more of plaintiffs, and in part over other lines not specified in the order. The commission alleges that the divisions of all carriers connecting immediately with applicants were reduced by said order. Answering further, the commission denies all other allegations of fact contained in said paragraps.

12. Answering paragraph 12 of the "third" section of the bill, the commission denies the allegations of fact contained therein.

13. Answering paragraph 13 of the "third" section of the bill, the commission denies that the division of the rate awarded the plaintiffs will not, in every instance, yield them in revenue the cost of operation for the service rendered and a reasonable return on their investments. The commission alleges that it is immaterial in this case whether or not said plaintiffs, or any of them, are earning a
28 return of 5.75 per cent, and alleges in this connection that the applicants are failing to earn actual operating expenses.

14. Answering paragraph 14 of the "third" section of the bill, the commission denies that it misconceived the meaning of, or misapplied, section 15 (6) of the interstate commerce act, and denies that its order will result in a denial to plaintiffs of rights guaranteed to them by the fifth amendment of the Constitution of the United States.

15. Answering paragraph 15 of the "third" section of the bill, the commission alleges that it has no knowledge as to whether applicants would be unable to respond in damages, or to make refunder of any or all of the revenue which would come into their possession

should the order take effect and later be judicially held to be unlawfully entered. In this connection, the commission alleges that if said order is suspended or set aside by an order of this court, applicants will be unable to continue the operation of their system of railroad and will suffer irreparable injuries as a result of such disability, and alleges further that applicants' line of railway serves a large territory and a great number of people served by no other railroad, and that the people and the territory dependent upon applicants' line or railway will suffer irreparable injury if its operation is discontinued.

IV.

Answering the bill further, the commission alleges that, in making said report and order, it considered and weighed carefully all of the evidence before it and gave due consideration and weight, among other things, to the factors which it is directed, either expressly or impliedly, to consider by the interstate commerce act; that it did not exceed the authority duly conferred upon it by law; and that the said report and order were not made without evidence to support them, or contrary to the evidence, and will not result in taking property of plaintiffs' without due process of law,
29 or in taking their property for public use without just compensation.

The commission further alleges that plaintiffs have not applied to the full commission for a rehearing or asked the full commission to reverse, modify, change, or to stay or suspend said order of division 4 of the commission.

Except as herein expressly admitted, the commission denies the truth of each of and all the allegations contained in the bill.

All of which matters and things the commission is ready to aver, maintain, and prove as this honorable court shall direct, and hereby prays that said petition be dismissed.

INTERSTATE COMMERCE COMMISSION.
By J. CARTER FORT, *Its Solicitor.*

P. J. FARRELL,
Of Counsel.

[Jurat showing the foregoing was duly sworn to by B. H. Meyer. Omitted in printing.]

[File endorsement omitted.]

30 In United States District Court.

Order of temporary injunction.

Filed October 9, 1922.

The application for injunction in this cause having been set down for hearing on September 16th last was, by agreement of counsel, continued to the 30th day of September, 1922, and coming on for

hearing before the undersigned judges at said time, it was ordered, after full consideration, that the motion of the Interstate Commerce Commission to dismiss said cause be and the same is now overruled. The plaintiffs appeared by T. J. Norton, Esquire, and M. G. Roberts, Esquire, their solicitors, the defendants by Blackburn Esterline, Esquire, and J. Carter Fort, Esquire, their solicitors, and the intervenors by E. A. Boyd, Esquire, their solicitor, and said application proceeded to hearing on said September 30th. Whereupon, counsel not having finished their argument, adjournment was taken until October 2nd, and hearing on said application continued.

On October 2, 1922, at the close of the hearing, it appearing to the court, from the full record of the proceedings before the commission on which its order now challenged was made, from affidavits in behalf of the plaintiffs submitted at the hearing, and from the arguments of counsel, that said order was made by said commission arbitrarily and unjustly, and without evidence submitted to it in support of same, and without consideration of its effect upon the rights of the plaintiffs in the subject matter, and without having heard or considered any testimony as to the effect of said order on the rights and interests of the plaintiffs, and that said order, if put into execution, will likely result in irreparable damages to the plaintiffs in the taking of their property without due or any process of law, it seemeth to the court that the immediate execution of said order so made by the Interstate Commerce Commission should be temporarily stayed and enjoined until a full and final hearing in this cause.

31 Wherefore, it is ordered that the said order of the Interstate Commerce Commission so made as aforesaid, and the immediate execution thereof, be, and it is hereby, temporarily stayed, suspended, and enjoined until further order, or until final hearing. It is further ordered that the plaintiffs give bond in the penal sum of one hundred thousand dollars ($100,000) to indemnify the defendants and the intervenors against any and all damages which they, or either of them, may suffer on account of this order of injunction.

It is further ordered that this cause be and the same is set down for final hearing at Denver on November 6th next.

It is further ordered that plaintiffs immediately cause a copy of this order, certified by the clerk, to be served on the defendants and the intervenors, or their respective counsel, and that they file proof of such service with the clerk.

This October 2nd, 1922.

ROBT. E. LEWIS,
Circuit Judge.
T. BLAKE KENNEDY,
District Judge.
J. FOSTER SYMES,
District Judge.

[File endorsement omitted.]

32

In United States District Court.

Answer of the United States.

Filed Nov. 27, 1922.

FIRST DEFENSE.

United States, for the first defense to the bill for injunction filed herein against it, says:

The bill with the exhibits attached thereto and made a part thereof is without equity on its face and does not state any cause of action against the United States and the court may not grant the relief prayed or any part of the same.

Wherefore the United States moves to dismiss the bill for want of equity.

SECOND DEFENSE.

United States, for the second defense to the bill filed herein against it, says:

That under title "third" of the bill it denies—

(a) The allegations contained in paragraph 4, and each and every part of the same, in manner and form as alleged;

(b) The allegations contained in paragraph 6 and each and every part of the same, in manner and form as alleged;

(c) The allegations contained in paragraph 7, and each and every part of the same, in manner and form as alleged;

(d) The allegations contained in paragraph 8, and each and every part of the same, in manner and form as alleged;

(e) The allegations contained in paragraph 9, and each and every part of the same, in manner and form as alleged;

(f) The allegations contained in paragraph 10, and each and every part of the same, in manner and form as alleged;

(g) The allegations contained in paragraph 11, and each and every part of the same, in manner and form as alleged;

(h) The allegations contained in paragraph 12 and each and every part of the same, in manner and form as alleged.

33 That under title "third" of the bill it denies the allegations contained in paragraphs 13, 14, and 15, and each and every part of the same, in manner and form as alleged. It alleges that none of the plaintiffs herein, all of whom were and are parties to the order of the Interstate Commerce Commission, though given due notice and accorded a full hearing, and who appeared by counsel before the commission and examined and cross-examined the witnesses for the applicant, offered or pretended to offer any evidence in its or their behalf before the commission in opposition to that offered by applicant or otherwise, although the plaintiffs herein by their counsel were fully apprised of the contents of the record

of the evidence and proceedings then before the commission. On the contrary, the plaintiffs herein, by their counsel, openly before the commission deliberately declined to adduce any evidence whatever on their own behalf and in opposition to the evidence adduced in support of the application. It alleges that the plaintiffs herein are now estopped (1) from challenging the validity of the order on evidence other than that which was before the commission and upon which the latter rested its order, and (2) from seeking to destroy that order on evidence withheld from the commission and herein offered for the first time.

THIRD DEFENSE.

United States, for the third defense to the bill filed herein against it, says:

The matters and things alleged in the bill and exhibits attached thereto and sought to be put in issue were all before the Interstate Commerce Commission, were fully heard and determined by it, and were within its power and authority to hear and determine under the provisions of the act to regulate commerce and the transportation act of 1920. In its report in writing with respect thereto, made after full hearing and on due notice to all of the parties, which states its conclusion, together with its decision, order, or re-
34 quirement in the premises, the matters and things of which complaint is made were fully considered and foreclosed by findings of fact based on substantial evidence.

BLACKBURN ESTERLINE,
Assistant to the Solicitor General.

[Jurat showing the foregoing was duly sworn to by Blackburn Esterline. Omitted in printing.]

[File endorsement omitted.]

35 IN UNITED STATES DISTRICT COURT.

Statement of evidence on final hearing.

Be it remembered, that on the 27th day of November, A. D. 1922, the above-entitled cause came on for final hearing upon the application of the plaintiffs for injunction, before the Honorable Robert E. Lewis, circuit judge, and the Honorable T. Blake Kennedy and the Honorable J. Foster Symes, district judges, the plaintiffs appearing by T. J. Norton, M. G. Roberts, and Robert Thompson, Esquires, their solicitors, the United States of America by Blackburn Esterline, Esquire, its solicitor, the Interstate Commerce Commission by J. Carter Fort, Esquire, its solicitor, and the interveners by E. A. Boyd, Esquire, their solicitor.

Thereupon the following proceedings were had:

On behalf of plaintiffs, copy of the record before the Interstate Commerce Commission in the proceeding entitled "Kansas City, Mexico & Orient Divisions," No. 13668, certified by the secretary of

the commission, was offered in evidence. It was received and marked "Exhibit A." (Copy of said Exhibit A is attached hereto.)

36 C. C. DANA, a witness called and sworn on behalf of plaintiffs, testified as follows:

Direct examination:

I am assistant freight traffic manager of the Atchison, Topeka & Santa Fe, Chicago, Ill., and appear here in behalf of all of the plaintiff carriers in this proceeding.

At this point the witness was asked the following question:

Q. Have you made a study of the order of the Interstate Commerce Commission in this case to show what would be its financial effect upon the plaintiff carriers?

Mr. Esterline interposed the following objection:

Mr. ESTERLINE. Now, if Your Honors please, counsel for the Government objects to the witness testifying, and to the testimony of the witness, at the time the testimony was offered and before the same was received, upon the following grounds:

1. If it has any bearing on any issue or question in this case, the testimony should have been offered at the hearing before the Interstate Commerce Commission.

2. Plaintiffs may not withhold evidence from the Interstate Commerce Commission and, in the event of an adverse order, tender such evidence in the first instance to the court.

3. The alleged invalidity of the order of the Interstate Commerce Commission in this case may be raised and determined only on the record of the evidence and proceedings before the commission on which it based its order, and not on evidence taken before the court in the first instance.

4. The plaintiffs are seeking to invoke the jurisdiction of, and hearing by, the court as a substitute for the jurisdiction of, and hearing by, the Interstate Commerce Commission, as provided by the acts to regulate commerce, on a subject matter over which, in this case, the commission has exclusive jurisdiction.

5. The plaintiffs may not attend a hearing before the
37 Interstate Commerce Commission, as provided by the statute, offer evidence of a certain nature and invite an order in their favor thereon, and then offer other evidence in another form to the court for the purpose of enjoining the adverse order of the commission.

6. The plaintiffs are seeking to deprive the Kansas City, Mexico & Orient Railroad Company of the hearing before the Interstate Commerce Commission provided by the act to regulate commerce and the transportation act of 1920.

7. The evidence offered by the plaintiffs has not been submitted to the Interstate Commerce Commission for its previous consideration and action.

8. The evidence now offered by the plaintiffs is incompetent, irrelevant, and immaterial, and otherwise inadmissible.

The counsel now asks the court to enter these objections, and each and all of the same, to the testimony of each witness after the witness is sworn, and to each question propounded to each witness, and to each answer made by each witness to each question so propounded, without the necessity of counsel having to repeat the objections, and each of them, to each question so propounded, and to each answer so made.

The court ruled upon said objections as follows:

By Judge LEWIS. We think we will hear the evidence subject to Mr. Esterline's objections, and subject to his motion to strike.

(Direct examination of Witness Dana resumed.)

Mr. Dana continued as follows: The matter with which I am dealing is exclusively that which was in the possession of the Interstate Commerce Commission in the trial below; and either appeared in the exhibits and evidence at the hearing before the commission in I. C. C. Docket 13668, or is contained in the table shown here and called sheet 6, which is shown in printed copy of the record at a page inserted between pages 404 and 405. There
38 is no matter here that has not been considered by the commission. I have a tabulation of what I intend to show to the court. I want to make this statement, that I am simply showing, in this exhibit, for all of the carriers, what Mr. Fort, in reply to the interrogation of the court, showed with respect to the A. T. & S. F. This exhibit (later received in evidence and marked "Exhibit B") consists of two pages. The first page is a statement of ton-miles and revenues under present divisions and as ordered in I. C. C. Docket No. 13668, accruing to the plaintiff carriers in this proceeding on freight traffic.

The present revenues, or the revenue, rather, of the Abilene & Southern Railway, on the basis of the traffic interchanged in 1921 under existing divisions, was $13,326.75. Revenue to the Abilene & Southern under the order of the commission in I. C. C. Docket No. 13668 would be $11,327.74. The revenue to the Abilene & Southern per ton-mile, or per ton per mile, rather, in cents, under the order, would be 3.733. The commission, in so-called sheet 6, between pages 404 and 405 of the printer record, show the operation expense per equated ton-mile, in cents, of the Abilene & Southern, to have been 3.429. For the A. T & S. F. Railway the revenue per ton-mile under the order would be, in cents, 1.449. The operation expenses as determined by the commission would be 1.097. The revenue per ton-mile for the C. R. I. & P. Railway under the order would be .868. That is to say, 8 mills and 68/100ths of a mill. The operation expenses as set up by the commission for the Rock Island were 1.157. The revenue per ton-mile for the Clinton, Oklahoma & Western Railway under the order would be 3.982. The operation expenses as shown by the commission were 4.060. The revenue per ton-mile for the Fort Worth & Denver City Railway under the order would be .933. Their operation expenses as shown by the order, or rather table of the commission, were .990. The revenue per ton-mile for the

Galveston, Harrisburg & San Antonio Railway under the
39 order would be .947. Their operation expenses as fixed by the commission, or as determined by the commission, were 1.264. The revenue per ton-mile for the Gulf, Colorado & Santa Fe Railway under the order would be .631. Their operation expenses as determined by the commission were .925. The revenue per ton-mile for the Midland Valley under the order would be .894. Their operation expenses as determined by the commission were 1.398. The revenue per ton-mile for the Missouri, Kansas & Texas Railway of Texas under the order would be .909. Their operation expenses as determined by the commission were 1.225. The revenue per ton-mile for the Missouri Pacific Railroad under the order would be .911. Their operation expenses as determined by the commission were 1.131. The revenue per ton-mile for the St. Louis-San Francisco Railway under the order would be .714. Their operation expenses as determined by the commission were 1.163. The revenue per ton-mile for the Texas & Pacific Railroad under the order would be 1.262. Their operation expenses as determined by the commission were 1.402. The revenue per ton-mile for the Wichita Falls & Northwestern Railroad under the order would be 1.641. Their operation expenses as determined by the commission were 1.846.

The second sheet is simply a computation based upon the statements which were filed by the respondent carriers in the proceeding below under the order of the commission. The results are not exactly the same as those I have given, because the figures submitted by the respondent carriers in the proceedings below as to ton-mile revenue varied from those submitted by the Orient. Generally speaking, the result is exactly the same, or, rather, let me give this summary: On sheet one of the exhibit, eleven of the thirteen carriers are shown to suffer a loss under the order of the commission. On sheet two but ten are shown to suffer a loss. The figures submitted by the Clinton, Oklahoma & Western show that they would get a profit out of the business still, or something over and above operating expenses.

40 Cross-examination by Mr. FORT:

Q. You take these figures to show that, as to the eleven roads of which you spoke, these divisions will not meet the expenses?

A. I do, based upon the figures which the commission itself set up.

Q. I am asking you now—you are representing the Santa Fe as a traffic man—whether you meant to testify on the stand that those figures show, in your assumption, that those eleven roads will not receive the cost of their transportation?

Mr. NORTON. That is objected to, because they have been objecting all along to the introduction of new evidence. We don't want Mr. Dana to testify as to what he might think, individually, about this. He is dealing with the record before the commission.

By Judge LEWIS. Let him answer.

Mr. NORTON. Exception.

A. I think they do, Mr. Fort, as to the traffic interchanged with the Orient.

Q. You think they do?

A. Yes.

Q. And you base that thought, of course, upon the fact that the cost figures you show there are significant in showing the cost of moving that interchange business?

A. I think they are; yes.

Q. Do you show the Orient here?

A. No, sir; I just considered the plaintiff carriers in this proceeding; I have made no figures as to what the result for the Orient would be.

Redirect examination:

Exhibit prepared by the witness, heretofore referred to by him, consisting of two sheet, was offered in evidence on behalf of plaintiffs. It was received and marked "Plaintiffs' Exhibit B." (Copy attached hereto.) There was objection by Mr. Esterline, which was overruled.

(Witness excused.)

41 Mr. Norton, on behalf of plaintiffs, offered in evidence an exemplified copy of an order of the Texas commission, in which, he stated, that commission declined to grant to the Orient Railroad Company, on State rates, the divisions which were ordered in its behalf by the Interstate Commerce Commission on interstate rates. The paper was received in evidence marked "Plaintiffs' Exhibit C."

Thereupon plaintiffs rested their case.

Thereupon defendants and interveners rested.

[File endorsement omitted.]

457 In United States District Court.

Stipulation as to printed copy of Exhibit "A."

Filed July 12, 1923.

In the above-entitled case it is stipulated that the printed copy of the record before the Interstate Commerce Commission, as corrected with pen and ink, which has been furnished to the clerk of the court by counsel for the United States and for the Interstate Commerce Commission, is a true and correct copy of Exhibit A, introduced in evidence by petitioners at the final hearing in this case, and may be so certified by the clerk of the court and used in the transcript on appeal.

BLACKBURN ESTERLINE,
By J. CARTER FORT,
Attorney for the United States.
J. CARTER FORT,
Attorney for the Interstate Commerce Commisison.
T. J. NORTON,
Attorney for Plaintiffs.

[File endorsement omitted.]

458 **Plaintiff's Exhibit "B."—Filed Mar. 19, 1923.**

Statement of ton-miles and revenues (under present divisions and as ordered in I. C. C. Docket No. 13668) accruing to the plaintiff carriers in this proceeding on freight traffic interchanged with the Orient system during the year 1921, as shown by Exhibits Nos. 25 and 26 of the Orient filed at the hearing; also comparison of plaintiff carriers' revenue per ton-mile under the order with the "Operation expense per equated ton-mile" as shown in sheet #6 of the order.

Plaintiff carriers.	Total ton-miles.	Total revenue under present divisions.	Total revenue under order I. C. C. Dkt. 13668.	Revenue per ton per mile in cents.		Operation expenses per equated ton-mile in cents as shown in sheet #6 of order.
				Present divisions.	Docket #13668.	
A. & S. Ry	303,391	$13,326.76	$11,327.74	4.392	3.733 3.429	3.429
A. T. & S. F. Ry	5,793,098	111,938.12	83,953.50	1.932	1.449 1.097	1.097
C. R. I. & P. Ry	35,122,543	381,190.94	304,952.75	1.085	.368 1.157	1.157
C. O. & W. R. R	206,788	9,149.72	8,234.75	4.425	3.982 4.060	4.060
F. W. & D. C. Ry	30,429,619	405,605.33	283,923.73	1.332	.933 .990	.990
G. H. & S. A. Ry	27,309,860	344,736.12	258,552.09	1.262	.947 1.264	1.264
G. C. & S. F. Ry	39,091,360	352,150.65	246,505.46	.900	.631 .925	.925
M. V. R. R	744,190	8,313.16	6,650.53	1.117	.894 1.398	1.398
M. K. & T. Ry. of T	8,583,709	97,585.46	78,068.37	1.136	.909 1.225	1.225
Mo. Pac. R. R	50,814,232	578,946.08	463,156.86	1.139	.911 1.131	1.131
St. L.-S. F. Ry	44,935,038	401,340.33	321,072.26	.893	.714 1.163	1.163
T. & P. Ry	38,309,337	605,704.07	484,563.26	1.578	1.262 1.402	1.402
W. F. & N. W. Ry	2,606,871	59,017.38	44,263.04	2.188	1.641	1.846

459 *Statement of ton-miles and revenues (under present divisions and as ordered in I. C. C. Docket No. 13668) accruing to the plaintiff carriers in this proceeding on freight traffic interchanged with the Orient system during the year 1921, as shown by the statements filed at the hearing by the plaintiff carriers (respondents below); also comparison of plaintiff carriers' revenue per ton-mile under the order with the "Operation expenses per equated ton-mile" as shown in sheet #6 of the order.*

Plaintiff carriers.	Total ton-miles.	Total revenue under present divisions.	Total revenue under order I. C. C. Dkt. 13668.	Revenue per ton per mile in cents.		Operation expenses per equated ton-mile in cents as shown in sheet #5 of order.
				Present divisions.	Docket #13668.	
A. & S. Ry	197,928	$11,866.08	$10,086.17	5.995	5.096	3.429
A. T. & S. F. Ry	4,773,733	88,957.01	66,717.76	1.863	1.398	1.097
C. R. I. & P. Ry	37,879,536	390,852.82	312,682.26	1.031	.825	1.157
C. O. & W. R. R	154,862	8,652.18	7,786.96	5.587	5.018	4.060
F. W. & D. C. Ry	29,112,197	407,441.23	285,208.86	1.399	.979	.990
G. H. & S. A. Ry	27,055,266	332,622.72	249,467.04	1.229	.922	1.264
G. C. & S. F. Ry	34,426,297	315,154.40	220,608.08	.915	.641	.925
M. V. R. R	792,310	8,365.64	6,692.51	1.056	.845	1.398
M. K. & T. Ry. of T	8,583,396	96,986.20	77,588.96	1.130	.904	1.225
Mo. Pac. R. R	44,844,242	551,758.10	441,406.48	1.230	.984	1.131
St. L.-S. F. Ry	41,695,085	402,682.95	322,146.36	.966	.773	1.163
T. & P. Ry	37,317,700	575,459.00	460,367.00	1.542	1.234	1.402
W. F. & N. W. Ry	2,406,005	59,028.43	44,271.32	2.619	1.840	1.846

[File endorsement omitted.]

460 *Plaintiff's Exhibit "C." Filed Mar. 19, 1923.*

[Certified copy of order of Railroad Commission of Texas dismissing application of Orient Railroad for increased divisions.]

Railroad Commission of Texas.

Hearing No. 2168. "Divisions, increased, to K. C., M. & O. Ry. of Texas on Texas intrastate freight traffic."

AUSTIN, TEXAS, *November 16, 1922.*

The above numbered and entitled cause having been called for hearing by the commission at its November Term, 1922, in pursuance of notice duly given therein under Circular No. 5649, and the commission having heard the facts, statements, and arguments presented by the applicant in support of the application presented, and by the other respondent carriers in protest against the same, and the commission having now duly considered the same, is of opinion and so finds that this commission is not, under the law of this State, vested with the power or authority to consider the stressed financial condition of a railroad company as a factor in arriving at a just division to accrue to it of a joint freight rate; it is further of the opinion and so finds that the existing freight rates applicable to the movements of traffic between the Kansas City, Mexico & Orient Railway of Texas and its connections seem just and reasonable, and that the prayer of the petition herein should be not granted.

It is therefore hereby ordered by the Railroad Commission of Texas that this cause be and the same is hereby dismissed.

ALLISON MAYFIELD, *Chairman,*
EARLE B. MAYFIELD, *Commissioner.*

Attest:
E. R. MCLEAN,
Secretary.

461 [Jurat showing the foregoing was duly sworn to by E. R. McLean. Omitted in printing.]

[File endorsement omitted.]

462 In United States District Court.

Stipulation as to record.

Filed June 21, 1923.

It is hereby stipulated and agreed that the foregoing is a true transcript of the record of the said District Court in the above-entitled matter as agreed on by the parties.

Dated June 18th, 1923.

T. J. NORTON,
M. G. ROBERTS,
For the Petitioners.
BLACKBURN ESTERLINE,
Assistant to the Solicitor General, for the United States.
J. CARTER FORT,
For the Interstate Commerce Commission.

[File endorsement omitted.]

In United States District Court.

Stipulation for approval of statement of evidence.

Filed June 21, 1923.

In the above-entitled case it is stipulated that an order may be entered approving the statement of evidence prepared by the appellants and providing that the transcript on appeal shall contain the portions of the record stated in the praecipe filed by the appellants.

T. J. NORTON,
M. G. ROBERTS,
For the Petitioners.
BLACKBURN ESTERLINE,
Assistant to the Solicitor General, for the United States.
463 J. CARTER FORT,
For the Interstate Commerce Commission.

[File endorsement omitted.]

In United States District Court.

Order approving statement of evidence.

Filed June 21, 1923.

Upon the stipulation of the parties, it is

Ordered, That the statement of evidence prepared by the appellants be, and the same hereby is, approved and that the transcript on appeal shall contain the portion of the records stated in the praecipe filed by the appellants.

Dated June 18th, 1923.

ROBT. E. LEWIS,
Presiding Judge.

O. K.
T. J. NORTON.
M. G. ROBERTS.

[File endorsement omitted.]

464 In United States District Court.

Opinion.

Filed Mar. 19, 1923.

Before Lewis, Circuit Judge, and Kennedy and Symes, District Judges.

Lewis, Circuit Judge, delivered the opinion of the court:

This is a final hearing on petition and application of 13 plaintiff carriers for the writ of injunction permanently restraining the en-

forcement of an order of the Interstate Commerce Commission, made in August, 1922, in these terms:

"A hearing and investigation of the matters involved in this proceeding having been had, and said division having, on the date hereof, made and filed a report containing its findings of fact and conclusions thereon, which report is hereby referred to and made a part hereof:

"It is ordered, That on and after September 15, 1922, the divisions of interstate joint rates received by Abilene & Southern Railway Company, the Atchison, Topeka & Santa Fe Railway Company, the Chicago, Rock Island & Pacific Railway Company, the Clinton & Oklahoma Western Railway Company, Fort Worth & Denver City Railway Company, the Galveston, Harrisburg & San Antonio Railway Company, Gulf, Colorado & Santa Fe Railway Company, Midland Valley Railroad Company, Missouri, Kansas & Texas Railway Company of Texas, and C. E. Schaff, receiver, Missouri Pacific Railroad Company, St. Louis-San Francisco Railway Company, the Texas & Pacific Railway Company, and J. L. Lancaster and Charles L. Wallace, receivers, and the Wichita Falls & Northwestern Railway Company, hereinafter termed the connecting lines, on freight traffic interchanged with the Kansas City, Mexico & Orient Railroad Company and its receiver, and the Kansas City, Mexico & Orient Railway Company of Texas, and their successors, hereinafter termed the Orient, shall not exceed the following percentages of the divisions accruing on such traffic to said connecting lines, respectively:

Abilene & Southern Railway Company	85 per cent.
The Atchison, Topeka & Santa Fe Railway Company	75 per cent.
The Chicago, Rock Island & Pacific Railway Company	80 per cent.
465 The Clinton & Oklahoma Western Railway Company	90 per cent.
Fort Worth & Denver City Railway Company	70 per cent.
The Galveston, Harrisburg & San Antonio Railway Company	75 per cent.
Gulf, Colorado & Santa Fe Railway Company	70 per cent.
Midland Valley Railroad Company	80 per cent.
Missouri, Kansas & Texas Railway Company of Texas, and C. E. Schaff, receiver	80 per cent.
Missouri Pacific Railroad Company	80 per cent.
St. Louis-San Francisco Railway Company	80 per cent.
The Texas & Pacific Railway Company, and J. L. Lancaster and Charles L. Wallace, receivers	80 per cent.
The Wichita Falls & Northwestern Railway Company	75 per cent.

"It is further ordered, That divisions of joint rates applicable to traffic as to which the Orient is an intermediate carrier shall be adjusted by the connecting lines on relative basis of proportions prescribed above.

"It is further ordered, That the several amounts by which the divisions accruing to said connecting lines are reduced under this order shall on and after September 15, 1922, accrue to the said Orient, in addition to the divisions theretofore accruing to said Orient on such traffic.

"It is further ordered, That the resulting divisions shall be reduced as far as practicable to two-figure percentages according to the rule prescribed in said report.

"It is further ordered, That said connecting lines above named, according as they participate in the transportation, be, and they are hereby, notified and required to cease and desist, on and after September 15, 1922, and thereafter to abstain, from asking, demanding, collecting, or receiving divisions of said interstate joint rates with the Orient upon other basis than those above prescribed.

"It is further ordered, That said connecting lines, respectively, and the Orient shall jointly report to this commission on or before September 15, 1922, the divisions established under this order, of each of said carriers with respect to freight traffic moving under interstate joint rates between each of the stations or groups of stations for which such divisions are determined; and shall thereafter jointly report the number of tons, ton-miles, and revenue with respect to such traffic actually interchanged for the period from September 15 to December 31, 1922, inclusive, and for the period from January 1 to June 30, 1923, inclusive; said reports for the period from September 15 to December 31, 1922, inclusive, shall be rendered on or before April 1, 1923, and the reports for the period from January 1 to June 30, 1923, inclusive, shall be rendered on or before October 1, 1923.

"It is further ordered, That the word 'division,' as herein used, shall mean the total apportionment of a joint rate, whether
466 determined by percentages, arbitraries, or otherwise.

"And it is further ordered, That this order shall continue in force until the further order of the commission."

The proceeding resulting in the order against the 13 carriers complaining here was on application of the Kansas City, Mexico & Orient Railway Company of Texas and the receiver of the Kansas City, Mexico & Orient Railroad Company, together called the Orient system, which owns and operates a continuous line of railroad 737 miles long extending from Wichita, Kansas, to Alpine, Texas. That application asked for relief from the commission as to routing of traffic over the Orient system consigned by or to the United States, and also traffic not routed by the shipper (with neither of which we are now concerned), and also, thirdly, "For investigation and appropriate order applicable to just, reasonable, and equitable division of joint and through rates, fares, and charges to enable applicant to pay operating expenses and taxes on its railway property held for and used in the service of transportation, under paragraph 6, section 15, interstate commerce act," as amended by the act of February 28, 1920 (41 Stat. 474). The application recited that the Orient could not longer render transportation service to the territory which it served, pay the interest and principal on its loan from the United States, and pay operating expenses and taxes on its property, unless it was given relief, and that it must cease operation if relief was not obtainable. It suggested for consideration as a method of relief an equalization of earnings between the weaker and stronger lines, and submitted with its application illustrated tables, Exhibits A to J, inclusive, of selected shipments that had been

routed over its line. The first table selected a car of sewing machines shipped from Cleveland, Ohio, to San Francisco, which passed over six different lines, including the Orient. The amounts received by each carrier under the existing divisions of the tariff were
467 noted. The method suggested was to deduct from the earnings of the stronger lines a per cent of their gross earnings per mile and apply it to the existing divisions of the weaker lines, thus changing the amount that would be received by each carrier, so that the initial carrier, the New York Central lines, instead of receiving $141.73, would receive $88.52, and the Orient, an intermediate carrier, instead of receiving $159.73, would receive $226.96. All of the other exhibits dealt with through shipments and were illustrated in the same way, and it was said in the application:

"Under such a plan the gross earnings per mile of each line in the United States would be adjusted annually. The burden of supporting the weaker lines would automatically shift to the lines at the time most able to bear it. The transportation systems would become self-sustaining and the rate burden upon the public lessened. * * * Basing the distribution of earnings upon existing divisions, a plan should be adopted which would prevent the stronger lines from retaining the earnings in excess of a 6 per cent return, and whereby such excess could be automatically applied to the aid of the weaker lines participating in the haul. The problem of the weaker lines would then be solved. * * * We look to the commission with a full assurance that the difficulties of the Orient system, and of all the other weak lines, which are necessary to the communities served, will be met and that a plan will be adopted which will constitute a permanent cure, and not simply a temporary relief";

and it was prayed that the commission make investigation and appropriate orders in aid of the Orient system "applicable to divisions of rates, fares, and charges in support of the weaker lines." Attention was called to the points or stations along the route of the Orient at which the roads of the 13 plaintiffs connected with the Orient.

An elaborate brief and argument accompanied the application, in which, in support of the third suggested method, it was said:

"The plan here suggested will enable the commission, which has the power, to order the distribution of that fund, as soon as collected from the paying public, to the immediate relief of the lines requiring aid, and in such a form as will not exhaust the credit nor add to the ultimate burden of the line receiving the aid. If the weaker line can only have access to this fund as a borrower, the evil day is only postponed. The interest and the principal must be repaid eventually out of earnings. Before this weaker line can borrow, it must show that its line is a public necessity and that the money
468 sought is necessary to enable it to perform its duty to the public; but it must repay out of money collected from the public the money so borrowed, with interest, in order to perform its duty to the public to whom it is a necessity. This is not arguing

in a circle. It is simply stating the vicious circle into which the weaker line is drawn by the borrowing process under the law. The commission alone is clothed with power to extricate the weaker lines from this vortex. That the public money may perform its immediate public function in creating adequate transportation facilities is the design of the plan which we are asking the commission to consider and adopt.

"It is inevitable that if the stronger lines are to be allowed to collect in the first instance earnings which will exceed the lawful return, there will accumulate in the hands of the commission a large sum, which will only be available to the weaker lines for loan purposes. The conditions upon which these loans can be lawfully made are such that the loan itself will constitute only temporary relief, and will ultimately be a burden upon the weaker lines, and will defeat the purpose of the law as to service to the public. We respectfully submit that it would be more equitable and just to all concerned and to the public to establish a method which would render the necessary assistance to the weaker lines in the first instance, without carrying with it the burdens of a loan. It would be eminently fair and just that the surplus earnings of the stronger lines be automatically diverted to the weaker lines to such an extent as to enable the payment of operating expenses and taxes without the necessity of the fund passing to the commission and then to be distributed under loans. * * * There can be no question as to the authority of the commission to render essential aid by appropriate orders as to divisions of rates, fares, and charges. It is this authority the exercise of which we are asking. With our request we are offering a workable plan which will accomplish the desired results. * * * The manifest purpose of the Congress, in the public interest, was to secure more liberal consideration for the weak roads than could be obtained by their unaided efforts. * * * We therefore urge the use of the present carrier divisions as the foundation upon which the commission will construct a plan which will meet the equities and necessities of the case. This superstructure could be changed from time to time, as found necessary, without destroying or disturbing the fundamental basis. * * *

"In financing the operations of the weaker lines, the commission has two available methods:

"First. It may distribute the earnings in excess of the legal return to the weaker lines in the form of a loan.

"Second. It may require a division of rates, fares, and charges, under the plan which we prepare, which will automatically divert this surplus to the weaker lines."

So far it is clear that there was no suggestion of only a redivision of joint rates then existing between the Orient and the 13 plaintiff carriers whose roads physically connected with the Orient system; neither was there a claim that those divisions, or any of them, were

"unjust, unreasonable, inequitable, or unduly preferential or
469 prejudicial" as between the carriers parties thereto. The application, the illustrative tables attached to it, and the brief and argument in support proposed no such method of assistance but a different one. The proposal was a redivision with all participating carriers on a plan which would require the stronger and more prosperous roads to sustain those that were weak and in failing financial condition, without regard to the amount or cost of services respectively rendered. It was said in the brief that the plan was preferable to the one adopted by Congress (sec. 15–a) for loans to weaker roads and that its result, if enforced, would eliminate all necessity, indeed possibility, for making such loans. The Orient's application was received by the commission in February, 1922, and on the third of April following it entered an order making 39 railroad companies, including the 13 plaintiff companies, respondents, assigned the proceeding for hearing before Examiner Burnside on May 15, 1922, and directed that all respondents be cited to appear. The commission by its order of that date instituted an investigation to determine whether or not the divisions of joint rates, fares, and charges on interchange traffic were unjust, unreasonable, inequitable, or unduly preferential or prejudicial within the meaning of the interstate commerce act, and if so, the just, reasonable, and equitable divisions thereof that should be received by the several carriers. It ordered that the applicants and each respondent should file with the commission on or before the date of hearing a statement showing the number of tons and ton-miles of freight transported on their respective lines moving under joint rates and interchanged, and the revenues respectively received therefor, for the year ended December 31, 1921. The order recites that it was made upon consideration of the Orient's application. It did not make any railway company whose lines are wholly east of the Mississippi River a respondent, though the lines of some of the 39 respondents extended into territory east of the river.

470 When the taking of testimony came on before Examiner Burnside he asked counsel for the Orient to present its evidence. Three witnesses were called—the Orient's general traffic manager, its chief clerk to the traffic department, and its chief clerk to the general auditor. Their testimony and exhibits introduced clearly show that the Orient system can not continue in operation unless it obtains assistance. Its property represents an invested capital of $29,000,000. The greater part of its line traverses a territory sparsely settled and semiarid. For the greater part of the way it is in competition with other lines upon either side, not many miles distant. Its local traffic is necessarily light. Its outgoing tonnage is chiefly livestock, considerable cotton, some grain and a small amount in miscellaneous productions. Its revenues are not enough to take care of its operating expenses and taxes on the present tariff bases. Hence, there has been for several years a continuing deficit, averaging at the time of the taking of proof about $75,000 a month.

It has defaulted in the payment of interest on a loan obtained from the United States, extended to it through the commission of $2,500,000. Its failing condition as a self-sustaining carrier is conceded. The plan of relief which it proposed, and shown in its illustrated tables, was gone into extensively by its general traffic manager. He recommended it as an appropriate remedy in taking care of all weak lines. Its deficit for 1922 will exceed $1,500,000. To make this up on interchange traffic its share in joint rates would require an increase of more than 60%. Owing to competition it was said to be impracticable to increase local rates. If the line remains with its termini at Wichita, Kansas, and Alpine, Texas—not continued through to Kansas City from Wichita and from Alpine through the Republic of Mexico to the Pacific coast, as originally projected—it was the opinion of the general traffic manager that it would be impossible to make it pay operating expenses. Practically all of the testimony in the record was directed to show that the Orient
471 system can not be made self-sustaining under present rates and conditions. It was seeking relief, and it suggested a plan which it believed would relieve its necessities. It made the record. The plaintiffs, aside from furnishing the statements showing the number of tons and ton-miles of freight transported on their lines and interchanged with the Orient for 1921 and the revenues therefor accruing to the Orient and to the respective plaintiffs, introduced no evidence. At the close of the proof introduced by the Orient the matter was submitted on the record without argument. And thereafter on August 9, 1922, division 4 of the commission announced in writing its conclusions and entered the order set out above. It released all respondent carriers except the 13 named in its order, whose roads physically connect with that of the Orient system. It found that "the divisions of interstate joint freight rates on traffic interchanged between the Orient and its immediate connections are unjust, unreasonable, and inequitable, and that for the future in respect of traffic originating or terminating on the Orient just, reasonable, and equitable divisions of such joint rates accruing to each of the connecting lines should, on the average, not exceed the following percentages of such divisions:

Abilene & Southern	85 per cent.
Atchison, Topeka & Santa Fe	75 per cent.
Chicago, Rock Island & Pacific	80 per cent.
Clinton & Oklahoma Western	90 per cent.
Fort Worth & Denver City	70 per cent.
Galveston, Harrisburg & San Antonio	75 per cent.
Gulf, Colorado & Santa Fe	70 per cent.
Midland Valley	80 per cent.
Missouri, Kansas & Texas of Texas	80 per cent.
Missouri Pacific	80 per cent.
St. Louis-San Francisco	80 per cent.
Texas & Pacific	80 per cent.
Wichita Falls & Northwestern	75 per cent.

"There are prescribed herein as the just, reasonable, and equitable divisions to be observed on and after September 15, 1922, divisions constructed substantially according to the following rules:

"Considering separately the several divisions of interstate rates on freight interchanged between the Orient and its connections and having origin or destination on the Orient, there shall be deducted from the revenue or proportion accruing under divisions to
472 said connections, whether determined upon arbitraries or percentages or in any other manner, the percentages hereinafter indicated of the totals of such revenue or proportions creditable to freight revenue, account No. 101, of such connections respectively; and the amounts so deducted from the revenues or proportions of its connections shall be added to the revenue or proportions of the Orient to wit:

Abilene & Southern	15 per cent.
Atchison, Topeka & Santa Fe	25 per cent.
Chicago, Rock Island & Pacific	20 per cent.
Clinton & Oklahoma Western	10 per cent.
Fort Worth & Denver City	30 per cent.
Galveston, Harrisburg & San Antonio	25 per cent.
Gulf, Colorado & Santa Fe	30 per cent.
Midland Valley	20 per cent.
Missouri, Kansas & Texas of Texas	20 per cent.
Missouri Pacific	20 per cent.
St. Louis-San Francisco	20 per cent.
Texas & Pacific	20 per cent.
Wichita Falls & Northwestern	25 per cent.

"Divisions of joint rates applicable to traffic as to which the Orient is an intermediate carrier will be adjusted by the immediate connections on relative basis of proportions prescribed above";
and its order followed.

There is no evidence in the record as to what the divisions of tariffs between the plaintiffs, or any of them, and the Orient were, unless those facts, necessary as a basis to support the commission's order, can be gleaned from the exhibits. There is no evidence in the record as to the amount and cost of service rendered by plaintiffs in the handling of interchange traffic, or any other proof tending to show that their proportions of divisions therefor were "unjust, unreasonable, inequitable, or unduly preferential or prejudicial" as between plaintiffs and the Orient, nor that the divisions prescribed by the commission in its order are "just, reasonable, and equitable" divisions as between them; unless those facts also can be adduced from some of the exhibits. Confessedly, from the arguments of counsel and their briefs, the issue comes down to the inquiry whether or not the necessary facts in support of the commission's order can be found in the exhibits; otherwise there is no proof on which the order can be rested. The necessities of a carrier, and the fact that it is being operated at a deficit, has been repeatedly held by the com-
473 mission to not to be a sufficient ground on which to order an increase of divisions in favor of the failing carrier. The building of a line into nonsupporting territory, or into a field already adequately served, can not be justly debited to other carriers, and as between the latter the fact that some have immediate connections seems wholly negligible as a ground of distinction. Federal V. R. R. Co. v. Toledo & Ohio Ry. Co., 68 I. C. C. 499; Laona & L. R. Co.

v. Milwaukee S. P. & S. S. M. Ry. Co., 52 I. C. C. 7; McGowan-Foshee L. Co. v. Florida A. & G. R. Co., 51 I. C. C. 317. Participating carriers in a joint service are entitled to be compensated in proportion to the amount of service and the cost of the service which they each render, and the fact that one of them is prosperous and the other not will not override the just right of each to a fairly proportionate share out of the joint earnings, whether the amount distributed to each be fully compensatory or be less to each than the value of the services so rendered. Pittsburgh & W. Va. Ry. Co. v. Pittsburgh & Lake Erie Co., 61 I. C. C. 272; New England Divisions case, 66 I. C. C. 196. Paragraph 4 of section 1 of the act makes it the duty of participating carriers to establish and agree upon just, reasonable, and equitable divisions between them of the joint rates, so that none of them will be unduly preferred or prejudiced. The law presumes that this duty and obligation which it imposes has been complied with, that the divisions which the participating carriers have made among themselves is just and equitable to each, and the commission is without power under section 15 (6) to prescribe new divisions unless after full hearing it be of the opinion on the facts adduced that the existing divisions are "unjust, unreasonable, inequitable, or unduly preferential or prejudicial as between the carriers"; and unless in the record presented there be some evidence to sustain such a conclusion its order abolishing old divisions and establishing new ones is without support and nonenforcible. I. C. C. v. L. & N. R. Co., 227 U. S. 88; I. C. C. v. U. P. R. Co., 222 U. S. 541; L. & N. R. Co. v. Finn, 235 U. S. 601; New York v. U. S., 257 U. S. 591, 600.

Taking up the exhibits (25 and 26, made up and offered by the Orient and corroborated by those which the commission re-
474 quired the plaintiffs to file), they show as to interchange traffic with the Orient, including intra- with inter- state shipments, both as to that delivered to and received from the 13 connecting carriers, the tons and ton-miles as to each plaintiff, the amount of revenue to each, including the Orient, and the rate per ton-mile for the carriage. Comparing the rate per ton-mile received by the Orient with that received by all of the 13 connecting carriers on all of their interchange business with the Orient for the year 1921, it appears that the rate to the Orient on that basis is slightly in excess of the average to all of the connecting carriers on the same basis: that is to say, the Orient received .0147¢ per ton-mile, which the average received by all of the 13 connecting carriers was .012¢. It received a higher ton-mile rate, both on traffic which it originated and also on traffic delivered to it by plaintiffs, than they received. Its ton-miles were less than the ton-miles of all of the plaintiffs in 1921 on the interchange traffic, and yet it received for its service $635,000 more than the total received by plaintiffs. The rate per ton-mile is not regarded as determinative of the amount and cost of service, but we think the record shows no better guide on that

inquiry. We appreciate the fact that the ability of the commission t make proper deductions and conclusions from statistics embodied i these exhibits, with which it is their duty to constantly deal, is fa greater than ours; but after prolonged study of these exhibits w have been unable to find in them any proof which in our judgmen tends to show what the existing divisions were, or to support a con clusion that those divisions are unjust, unreasonable, inequitable, o unduly preferential or prejudicial as between the participating car riers. We are confirmed in our conclusion in that respect, becaus counsel for the commission does not argue that the exhibits alon show the divisions or that they are unjust and inequitable, but fo that purpose contends that the exhibits coupled with data taken fro the annual reports of the Orient and the 13 plaintiff carriers, whic are set out in tabulated form in the commission's report, sustain th conclusion of fact and order. He concedes that the data so made u from the annual reports as in part the basis for the commisson's conclusion could not be obtained from the testimony and
475 exhibits in the case, but contends that the commission had right to consider the annual reports filed with it by the car riers, for the purposes for which they were used in reaching its con clusion. The annual reports were not offered in evidence, and coun sel for plaintiffs insist that for that reason the commission had n right to consider them. The proposition as to whether the annual reports could be considered arose early in the taking of the testi mony. The examiner said:

"I have no doubt it will be necessary to refer to the annual reports of all these carriers. Will it be understood at the outset that those reports may be referred to?"

Counsel for plaintiffs replied:

"If anything from the annual reports is to be considered in the case it should be formally a part of the record by abstract or extrac tion therefrom."

Thereupon the examiner said:

"The rules of practice of the commission now effective, I think, provide that the annual reports may be used in evidence, and the requirement is that all matters which may be pertinent or which may be used in the case be reproduced and furnished in exhibits, but that would be quite a burden, and I feel constrained to proceed under the rule of the commission."

The rule of the commission which the examiner and counsel must have had in mind reads thus:

"(a) Where relevant and material matter offered in evidence by any party is embraced in a book, paper, or document containing other matter, not material or relevant, the party must plainly desig nate the matter so offered. If the other matter is in such volum as would unnecessarily cumber the record, such book, paper, or docu ment will not be received in evidence but may be marked for identi fication and, if properly authenticated, the relevant and materia matter may be read into the record, or, if the presiding commissione

or examiner so directs, a true copy of such matter, in proper form, shall be received as an exhibit, and like copies delivered by the party offering the same to opposing parties or their attorneys appearing at the hearing, who shall be afforded opportunity to examine the book, paper, or document, and to offer in evidence in like manner other portions thereof if found to be material and relevant. "(b)
In case any portion of a tariff, report, circular, or other docu-
476 ment on file with the commission is offered in evidence, the party offering the same must give specific reference to the items or pages and lines thereof to be considered. The commission will take notice of items in tariffs and annual or other periodical reports of carriers properly on file with it or in annual, statistical, and other official reports of the commission. When it is desired to direct the commission's attention to such tariffs or reports upon hearing or in briefs or argument it must be done with the precision specified in the second preceding sentence. In case any testimony in proceedings other than the one on hearing is offered in evidence, a copy of such testimony must be presented as an exhibit. When exhibits of a documentary character are to be offered in evidence, copies must be furnished to opposing counsel";

and we are of opinion that the statement of the examiner was notice to the parties that the annual reports would not be considered unless the rule was complied with, and it was not complied with. It follows that the annual reports and the data which they contain were not made a part of the record, and were not properly before the commission for consideration in reaching its conclusions. But taking the data extracted by the commission from the annual reports and embodied in its opinion, their utilization was comparative—not self-probative of the ultimate fact, but supposedly a means to ascertain that fact. They showed all business done by all participating carriers in 1921 as to revenues and expenses per equated ton-mile, car-mile, and train-mile in cents, the net revenues and net railway operating income in the same units, the gross and net revenue return in dollars per $1,000 invested, and the railway operating income, from which the per centums in gross and net revenues and railway operating income of each carrier is calculated and put down, from which it appears that the Orient sustained a deficit in railway operating income of 2.77%, and the 13 plaintiff carriers a per centum profit as follows:

Fort Worth & Denver City Ry	12.13
Gulf, Colorado & Santa Fe Ry	10.73
Wichita Falls and Northwestern	6.31
Atchison, Topeka & Santa Fe	6.27
St. Louis-San Francisco	4.77
Wichita Valley	4.66
Chicago, Rock Island & Pacific	4.24
Abilene & Southern	4.09
Missouri, Kansas & Texas of Texas	3.42
Missouri Pacific	2.71
477 Texas & Pacific	2.26
Galveston, Harrisburg & San Antonio	1.88
Clinton, Oklahoma & Western	1.39

On the ton-mile unit the revenues of nine of the plaintiffs were less than that of the Orient, on the car-mile unit two of the plaintiffs received less revenue than the Orient, and on the train-mile unit the revenues of the Orient were substantially less than any of the plaintiffs. On the same units the operating expenses per equated ton-mile of two of the plaintiffs were greater, on the car-mile four were greater, and on the train-mile six were greater than the Orient. The Orient sustained a net loss under all three units of measure applied, while all of the 13 plaintiffs show a profit under each measure. The annual reports from which the commission obtained and used its data as proof covered all of the business of the 13 plaintiffs, both freight and passenger, the lines of some of them extending through many States—one from Chicago to California, and others serving territory equal in extent—and we are unable to understand how the deductions made by the commission from the annual reports may be considered to any extent as a helpful guide in determining whether the divisions of freight rates on traffic interchanged with the Orient were unfair or inequitable, or as contributive facts in determining just and equitable divisions between them. We think they added nothing to the facts in the record for the solution of the issue before the commission under section 15 (6) of the act. It seems to us that the inquiry was not directed to an ascertainment of the relative amount and cost of service on interchange traffic as between the Orient and the plaintiffs, and that there is no proof, including the annual reports, which will sustain a conclusion that existing divisions were unjust and inequitable at the time the order was made. The order is said to be of the blanket type. It cut through all existing divisions alike and took from each carrier a uniform per cent and added
478 it to the Orient's share under the old divisions. A comparison of those per cents with the per centums of railway operating income discloses that the greater the income of plaintiffs the greater the increase allowed the Orient by deductions from the more prosperous roads. This was the method of relief proposed by the Orient in its application.

The transportation act discloses no intention to vest the commission with power to relieve the necessities of weaker lines by imposing the burden upon its connections, simply because they are able to bear it. It exhibits a contrary purpose in section 15–a, because that policy would tend to bring all carriers to the same level in earnings and there would be no necessity for loans and no fund probably could be recovered for making them.

Much stress is placed on the literal expression found in paragraph 6, section 15, as to what the commission shall consider "in so prescribing and determining the divisions of joint rates, fares, and charges." Efficiency is an element in the cost of service, though not, we believe, to the extent of giving a reward to inefficiency; revenue required to pay operating expenses, taxes, and a fair return is of weight in determining whether an increase in the joint rate should be allowed, and if so, whether all or what part of the increase should

be given to a particular carrier, or whether there should be a decrease, and how borne; likewise, the importance to the public served, as to what the joint rate should be. But paragraph 6 is not isolated. Other parts of section 15 give the commission power to fix joint rates. Its whole power over the subject is in contemplation in paragraph 6. There is thus a mingling in that paragraph of subject matters to be considered by the commission on the different in-
479 quiries, some of weight in determining what the joint rates should be, in which both the public and all participating carriers are interested, and others in which the public has no concern. It is not interested as to which participant be the originating, intermediate, or delivering carrier, nor the mileage haul of each, nor how existing divisions should be divided between them, except remotely. No one but participating carriers are interested in a redivision of existing rates. So that it seems obvious to us that the phrase in paragraph 6 so much relied upon intends that all of the subjects named for consideration have application only where the inquiry goes to the extent of both fixing and dividing the joint rates; and that where it extends only to a division of existing rates, some of the things named for consideration by the commission have no relevancy to or weight in determining what the new divisions shall be. In such an investigation we think the controlling inquiry must necessarily be directed to ascertaining the amount and cost of service to each of them. It is not shown that the Orient maintains switching and terminal facilities for joint use, or is otherwise specially burdened at points of exchange, or that it is put to unusual expense in the joint service. It does show it makes empty hauls; but that, we take it, is true of all roads, especially when there is heavy movement to market. It is said that none of the territory along its line produces coal and lumber, and that it must receive those commodities, which it is required to use, from its connections at a charge for their service; but, so far as the proof discloses, that may be true also of some or all of the plaintiffs. In short, we find no facts in the record which sustain the order, except the broad proposition, amply supported by proof, that the Orient is not self-sustaining and needs help; but we can not assent that the commission is empowered to compel prosperous roads, because they are prosperous, to contribute
480 their services to the sustenance of weak roads, because they are weak. The character of the inquiry and the character of the order force us to the conclusion that that was what the commission intended to do and did do.

Neither side claims that the New England Divisions case (66 I. C. C. 196, 282 Fed. 306) is controlling or even helpful here. It was said by the court in 282 Fed. 313: "The question before the commission was the apportionment of the joint fund in proportion to the services rendered." The divisions there under consideration had stood for thirty years, the relations of the carriers to the joint service and the advantages and burdens imposed on each had greatly changed, the grounds on which the New England roads asked relief

were definitely set out, wherein the changed conditions to their relative disadvantage is made to appear, and the District Court said the evidence sustained the claim. On appeal of that case the Supreme Court said (opinion filed Feb. 19): "An order, regular on its face, may, of course, be set aside if made to accomplish a purpose not authorized. * * * It is not true, as argued, that the order compels the strong railroads to support the weak," and that the increase given to the New England lines on the new division was all paid out of the rate increase ordered in Ex parte 74; and in a footnote: "Papers on the commission's files are not a part of the record in a case, unless they are introduced as evidence."

Both respondents have filed motions to dismiss, and it is claimed that they should be sustained because this proceeding was prematurely brought. It is argued that inasmuch as section 16–a of the act gave the plaintiffs the right to apply to the commission for a rehearing, that remedy should have been exhausted before this suit could be instituted. The application for a rehearing does not operate to stay the execution of the commission's order. The act
481 provides that it be not stayed on such an application unless the commission by special order grants a stay. Nothing could have been done by plaintiffs pending application for rehearing that would have stayed the execution of the order as a matter of right. We think plaintiffs were entitled to take the order as final for the purpose of this proceeding. See Chicago Ry. Co. v. Illinois Commerce Co., 277 Fed. 970.

It is our opinion that the motions should be denied and that plaintiffs are entitled to an order and writ as prayed.

In United States District Court.

Dissenting opinion.

Filed March 19, 1923.

Kennedy, District Judge, dissenting:

It is with regret that I find myself unable to accede to the views of the majority in the disposition of this case, although I have joined with the other judges in signing the order carrying into effect their decision so that there may be no question as to its validity. I have been accorded the privilege of expressing my views as to the manner in which the case should be disposed of and herein express in a general way the reasons for my conclusion.

482 This is a proceeding involving the application of thirteen plaintiff carriers for a permanent writ of injunction restraining the enforcement of an order of the Interstate Commerce Commission made August 9, 1922, providing for an increased division of joint rates to the Kansas City, Mexico & Orient Railroad as against the plaintiff carriers.

After analyzing the case of the plaintiffs in the light of the points of attack carried in the arguments and briefs of counsel, I am con-

strained to eliminate from consideration as not having sufficient weight or bearing upon the controversy to entitle plaintiffs to relief the following:

a. It seems to me that there could be no question of confiscation generally where the commission has made a division of joint rates. Such a division would not prohibit the carriers affected in establishing a new joint rate which would bring to them a greater amount of money for the service rendered. If the commission should refuse to recognize such increased rate it might form the basis of an action in the courts that the established joint rate was confiscatory. In other words, until relief is denied by the commission itself, which is not the situation in this case, the question of a rate being confiscatory could not be raised.

b. I am not in accord with the views of the plaintiffs that the order of the commission is invalid because of failure to join other carriers who participated in the joint rates affected by the order, for the reason that the connecting carriers will simply be required to distribute the burden cast upon them among other connecting carriers, and so on among all carriers between or among which there is a joint rate established embracing the Orient Railway. It is the same as though these railroads had not yet but were now called upon to first establish joint rates as among all carriers.

483 c. As to the questions decided by the commission as reflected in the order attacked, not being within the issues raised by the pleadings before the commission, I do not consider that the objection is well founded. As long as the transportation act gives the commission the right to make investigations upon its own initiative as well as upon the complaint of one road as against another, coupled with the fact that in the first instance the Orient, with little attempt at formality of pleading or statement of ground for relief, simply ask the commission to investigate the question of joint rates and the commission thereupon proceeded to make such investigation, that we can not well take the narrow view that the commission did not have full power and authority upon the hearing to go into every phase of joint rates in which the Orient was interested.

d. As to the point that the commission arrived at its conclusions upon statistical data and information not introduced in evidence, I am inclined to believe that this is fully covered by the admitted procedure before the commission that it is a quasi-judicial body and not to be governed by the strict rules of evidence. The notice by the commission to these carriers that it was investigating joint rates with the Orient was sufficient to bring to their attention that all matters incident to the changing of those rates was before the commission. The chief criticism is that the commission considered the annual reports of the carriers themselves in arriving at their conclusions. These reports are filed with the commission, and so far as the carrier is concerned are authentic and binding upon it. The carrier was fully cognizant of the contents of the report and

could not very well be heard to deny the truth of its contents. It is an admission of against interest. In an investigation of this
484 character instituted by the commission upon the suggestion of a carrier concerned in joint rates, I consider it to be incumbent upon each carrier summoned to give the commission a full, fair, and frank statement and proof of how any diminution in joint rates then under consideration would affect it. This the plaintiffs in this case did not consider it to be their duty to do, as they offered no evidence. The very establishment of the commission itself carries the conclusion that it was the idea of Congress to establish a flexible tribunal consisting of experts to pass upon those questions which manifestly could not be effectively handled by the courts. A kindred thought arises in this connection, that such tribunal must be allowed the greatest possible latitude within only constitutional limitations in working out the problems before it without interference from the courts.

As a matter of fact, the record discloses that the respondent carriers had notice that annual reports would be referred to and considered in the proceeding. (Printed record, p. 74.) It was earnestly argued by counsel for plaintiffs that this could not be done without the formal introduction of the reports in evidence or such portions of them as the parties before the commission desired to have considered in their behalf. In one of the rules of the commission, however, appears this paragraph: "The commission will take notice of items in tariffs and annual and other periodical reports of carriers properly filed with it * * *." It is true that the same rule provides how the parties before the commission may direct the commission's attention to such reports by specifying and identifying the particular portion desired to be considered. It would seem that a liberal construction of this rule might be that the commission could under this rule, upon its own initiative, consider annual
485 reports of the carriers filed with the commission, whether formally introduced by the litigants or not. Certainly it has probative force in connection with the statement of the examiner, the official representative of the commission, that these reports were going to be used, of which the carriers had notice early in the proceeding. This, in connection with the admitted competency of the reports as evidence, would seem to me to be sufficient as to the form of introduction in a proceeding before the commission, if not in strict accordance with court procedure.

e. I do not agree with the contention of counsel for the plaintiffs that the matter before the commission was disposed of solely upon the theory of taking from the stronger and giving to the weaker. However, a fair interpretation of section 15, subdivision 6, of the transportation act would seem to imply that the commission may now take into consideration elements in determining the basis of joint rates which reflect in a degree the right of the commission to have as one of its chief purposes the building up of an effective transportation system throughout the country. In fact, the Supreme

Court has held this affirmatively in the Wisconsin case in construing the act before the recent amendment. (R. R. Commission of Wisconsin v. C. B. & Q. R. R. Co., 257 U. S. 585.) Does it not, therefore, logically follow that where the carrier is operating under such conditions as to make its operation from the standpoint of a financial success extremely difficult, but that the carrier is necessary to the service of the country through which it runs, that in the broad light of giving effective service to the people it becomes necessary to adopt the very broadest policies in the treatment of such a carrier? As a concrete illustration, it is for the good of the people of Boston
486 to be able to ship goods to a point in Texas on the Orient Railway and so from any other portion of the United States. In the long run such a policy would not work as a hardship against the similar participation of other roads in a joint rate, but would generally, at least eventually, mean a greater amount of business for those roads. They could not, therefore, complain unless the Interstate Commerce Commission should order that they conduct their joint traffic with the Orient upon a basis which was confiscatory, but that question is not in this case, as the commission has not denied them relief growing out of the situation brought about by the lesser division to them of joint rates with the Orient.

As to a contribution by the stronger to the weaker, while not recognized as a basis for the determination of property rights, yet as a principle it does exist in every activity of life. The strong absorb the deficiencies of the weak. One customer of a merchant fails to pay his honest debt and that merchant as a result must charge a higher rate upon his products for sale, so that his loss is absorbed in the general business, and this burden falls upon those who do pay their debts. I am not seeking, however, to justify and sustain the order of the commission upon the basis that the commission has adopted in this case, the theory of taking from the stronger and giving to the weaker road, but in the general plan of carrying out the purposes of the transportation problem of the country as contained in the transportation act, and, as interpreted by the courts, it becomes necessary in a measure to distribute the burden so that the entire country will have the benefit, as far as may be possible, of efficient transportation facilities. As soon as it may be determined that a common carrier is a necessary servant for the community in which it exists, in which determination the commission is the sole arbiter, it then becomes necessary for the Interstate Commerce Commission to see that it does exist,
487 which could not be brought about by the infliction of prohibitive high local rates not to be reasonably borne by the peoples and industries which the carrier immediately serves.

The principal ground upon which we all agree that enforcement of the order complained of must be restrained, if at all, is that there is a lack of sufficient substantial evidence in the record to sustain the order.

The main argument of counsel for plaintiffs upon this point is that without an introduction of division sheets showing what the divisions actually were, the commission had no evidence to base its finding of fact as to the division of joint rates to the Orient being unjust, unreasonable, or inequitable, and that in the absence of this or such a number of them for examples as would enable the commission to determine with a degree of accuracy the general trend of divisions, that there was no evidence before the commission upon this point. Counsel strongly rely upon the New England case in supporting this contention. It is true that the decision in the New England case by the commission was based upon evidence afforded through division sheets. It does not follow that the evidence in this or any other case must necessarily be based upon division sheets if the evidence can be presented to the commission in another form.

It is contended by counsel for the commission that the evidence in this case, while not in the form of division sheets, is much more complete and exhaustive than were division sheets relied upon, and I agree with counsel in this contention. Division sheets, unless tens of thousands were introduced in evidence, could only be used as samples in reflecting joint rates upon different commodities from which the commission would be required to draw general conclusions as to the fairness of all joint rates. In the case at bar the pro-
488 ceeds from joint rates were themselves definitely and accurately determined. (Printed record, exhibits 25 and 26.) By a process of computation the funds actually accruing from joint rates to the Orient and to its connections were determined, which as a problem gives the actual definite answer with relation to which the consideration of sample division sheets would only be an approximate guess.

Therefore all the evidence which would have been before the commission by the introduction of so-called sample division sheets, the commission had before it in the form of evidence determining the actual results in dollars and cents based upon joint rates between the Orient and its connections. This, in my opinion, would give a more substantial basis upon which to predicate any action by the commission than would division sheets for the reason that the method reflects the concrete result of all divisions of the joint rates in controversy. These amounts received were analyzed in connection with the tonnage and the ton-miles which the joint fund divided between the several carriers represented and afforded a basis of determining the revenue per ton-mile of all carriers concerned. A further analysis probably demonstrated that the Orient was receiving more for its service on the basis of per ton-mile than the majority of its carriers, which might be taken superficially to prove that the present divisions in force before the order of the commission went into effect were then just and equitable so far as the Orient was concerned. It is admitted, however, by both sides to this controversy that the per-ton-mile basis is not a fair one for sole use in determining divisions.

So many different elements enter into the determination of the cost of service that the per ton-mile should only be considered as one element. This was evidently the idea of the commission because it proceeded to go further in its investigations as to the elements
489 entering into the service required in carrying on joint traffic.

Many pages of the record are used in ascertaining the physical facts surrounding the operation of the carriers. With the Orient it was found that it operated under many conditions which were not common to railroads. The fact that it runs through a comparatively sparsely settled portion of the country, affecting its local traffic; that it does not have fuel and building material upon or in proximity to its line and thereby being compelled to pay tonnage to other lines in order to secure these necessary supplies; and that in the shipment of livestock, cement, etc., in proximity to its lines it must undergo a long haul of empty cars on account of there being only a one-way tonnage available, as well as other elements of difference in situation, compared with that of its connecting carriers. All of this data and material were gathered from the evidence itself introduced or from facts of which the commission should take judicial notice and were evidence in the case upon which the commission had the right to base a decision; that, all elements considered, the Orient was not receiving its fair and just proportion of joint rates. And, so far as this court is concerned, it is only incumbent upon the commission to secure its order against attack in this proceeding to demonstrate to this court that there was substantial evidence to support the order.

As was said by the Supreme Court in the recent case of The Akron, Canton and Youngstown Railway Co. et al. v. The United States, decided February 19, 1923, "to consider the weight of the evidence, or the wisdom of the order entered, is beyond our province."

Particular criticism is made of the tabulation found on page 404 of the report in that it purports to have been made up by the commission from the annual reports of the railroads before the commission in this hearing in that, first, the reports ought not
490 to have been considered as evidence as heretofore suggested because not formally introduced in evidence, and second, that it purports to have been made up from the revenues of the railroads in their entirety and not from revenues accruing from divisions of joint rates, or even from freight as distinguished from passenger traffic. I consider that the latter criticism is in a way justified, but computations from these reports need only to be used in a sense as being persuasive that the division of joint rates to the Orient are inequitable. It must be admitted, I believe, that it would be absolutely impossible to determine with absolute accuracy the separate and distinct cost of carrying on joint traffic as distinguished from all other traffic which the road carries on, whether that traffic be freight or passenger, with a single train carrying both joint and other traffic, and otherwise subject to varying conditions. It would seem to me to be practically impossible to segregate the different classes of traf-

fic and say with respect to joint traffic there were a profit or loss, or with respect to other traffic there were a profit or loss. It would be difficult for a merchant to say with a degree of accuracy that the carrying of a specific bolt of cloth upon his shelves caused him to suffer a direct profit or a direct loss. It might be that the possession for sale of that particular bolt of cloth in itself might not reflect a profit, and yet its possession for the satisfaction of a single customer might bring a large profit accruing from the sale of his other materials in stock.

The compilation therefore as referred to might not be conclusive, independent of all other evidence, as proving the unfairness of the joint rates to the Orient and yet itself an element which the commission had the right to take into consideration; and, in fact, it
491 may be the best available method of securing in its larger sense a reflection of the fairness of a division of joint rates among carriers. This compilation shows generally a greater net revenue, in relation to operating expense, to plaintiff carriers than to the Orient.

If our conclusion be sound that there is in the record substantial evidence to sustain the order of the commission, it seems to me we do not arrive at the point of considering whether the percentage basis adopted by the commission with respect to the different roads were proper or otherwise. If that percentage should be unfair in some instances, the door of the commission is open to those who consider themselves aggrieved thereby. It is not for this court, untrained in the technical proposition of rate making, to presume to say that the divisions are too high or too low, especially until such time, as hereinbefore intimated, that the commission has established a rate which will work a confiscation of the property of the carrier. We can conceive that it might be found by the commission, upon these carriers feeling themselves aggrieved by the order and presenting evidence sustaining their contention of unfairness, that the commission might modify the percentages to suit the facts then before them, or the commission might upon application permit the joint carriers to profit by a raise in rate. This, however, is for the commission to determine and not the courts.

[File endorsement omitted.]

492 In United States District Court.

Order overruling motions to dismiss.

Filed Mar. 19, 1923.

The motions of the defendants to dismiss the bill of complaint, heretofore filed in this cause, having been considered by the court, and the court being now of opinion that neither of said motions is well taken;

It is ordered that each of said motions be, and the same is, overruled.

This 16th day of March, A. D. 1923.

ROBT. E. LEWIS,
U. S. Circuit Judge.
T. BLAKE KENNEDY,
U. S. District Judge.
J. FOSTER SYMES,
U. S. District Judge.

[File endorsement omitted.]

493 In United States District Court.

Order granting permanent injunction.

Filed Mar. 19, 1923.

After final hearing of this cause, including arguments of counsel for all of the respective parties, it was submitted to the court with leave to file briefs, which have been considered, and the court being now fully advised in the premises, it finds the issues in favor of plaintiffs, whereupon,

It is considered, ordered, and decreed that the temporary injunction heretofore granted be, and the same is now, made permanent and perpetual, and the defendants and all persons acting in their behalf are forever prohibited and enjoined from enforcing against the plaintiffs, and each of them, and their respective representatives, agents, and servants the said order made by the Interstate Commerce Commission, division 4, on the 9th day of August, 1922, wherein it found and ordered that the then existing divisions on freight traffic interchanged should be diminished as to the plaintiffs and increased in favor of the Kansas City, Mexico & Orient Railroad Company and its receiver, and the Kansas City, Mexico & Orient Railway Company of Texas, in the percentages of said existing divisions as in said order set forth. It is further ordered that the permanent writ of injunction may issue from the clerk's office on application of plaintiffs, or either of them, commanding as aforesaid.

It is further ordered that unless there be reversal on appeal from this decree, plaintiffs and their surety be and they are released from all obligation on their bond heretofore given in this cause, and that none of the parties hereto shall recover its costs.

494 This 16th day of March, A. D. 1923.

ROBT. E. LEWIS,
U. S. Circuit Judge.
T. BLAKE KENNEDY,
U. S. District Judge.
J. FOSTER SYMES,
U. S. District Judge.

[File endorsement omitted.]

495 In United States District Court.

Petition for rehearing.

Filed Apr. 5, 1923.

United States of America, by its counsel, now comes and respectfully moves the court to vacate the order, entered March 16, 1923, granting the permanent injunction in the above-entitled cause, and to grant a rehearing, or for a modification of the opinion herein, and assigns as grounds therefor the following reasons, which it presents in good faith and which it believes are sufficient to warrant the court to grant the petition.

I

The opinion and judgment of the United States District Court for the Southern District of New York in the case of Akron, Canton & Youngstown Railway Co. v. United States, 282 Fed. Rep. 306, and the opinion and judgment of the Supreme Court of the United States in Akron, Canton & Youngstown Railway Co. v. United States, decided February 19, 1923, which affirmed the judgment of the District Court, were not sufficiently considered.

In the opinion in instant case the only reference to the foregoing opinions is as follows:

"Neither side claims that the New England Divisions case (66 I. C. C. 196, 282 Fed. 306) is controlling or even helpful here. It was said by the court in 282 Fed. 313: 'The question before the commission was the apportionment of the joint fund in proportion to the services rendered.' The divisions there under consideration had stood for thirty years, the relations of the carriers to the joint service and the advantages and burdens imposed on each had greatly changed, the grounds on which the New England roads asked relief were definitely set out, wherein the changed conditions to their relative disadvantage is made to appear, and the District Court said the evidence sustained the claim. On appeal of that case the Supreme Court said (opinion filed Feb. 19): 'An order, regular on its face, may, of course, be set aside if made to accomplish a purpose not authorized. * * * It is not true, as argued, that the order compels the strong railroads to support the weak,' and that
496 the increase given to the New England lines on the new division was all paid out of the rate increase ordered in Ex parte 74; and in a footnote: 'Papers on the commission's files are not a part of the record in a case, unless they are introduced as evidence.'"

Bearing in mind the generous and patient consideration the judges of this court accorded to the counsel for the parties during two protracted hearings, it is now respectfully submitted that the foregoing paragraph neither correctly gives the position of the counsel at the bar with respect to the New England Divisions case nor sufficient

consideration to the opinions of the District Court and the Supreme Court.

The sentence "Neither side claims that the New England Divisions case (66 I. C. C. 196, 282 Fed. 306) is controlling or even helpful here" is not sustained by the documents in the record.

On the hearing of the application for temporary injunction, September 30, 1922, the main argument of counsel for the United States in opposition to the application was that the opinion of the District Court, Southern District of New York (Circuit Judges Hough, Manton, and Mayor all concurring) was persuasive against the plaintiffs in the instant case; and the fact was mentioned and emphasized that while plaintiffs in this case, on that hearing, had filed a brief of 72 printed pages they studiously avoided any reference thereto. The transcript of the stenographer's notes will disclose that counsel for the Government read at almost undue length from Circuit Judge Manton's opinion on both hearings.

The statement by this court that "Neither side claims that the New England Divisions case is controlling or even helpful here" was certainly not the impression of counsel for the plaintiffs, who, in their elaborate brief on the final hearing, reviewed at length the stenographer's notes of the argument previously made by counsel for the United States, with respect to which they say (p. 54):

"In the New England case, *upon which counsel for the United States relied in oral argument* (Argument, p. 84) *and upon which we rely even more confidently*, the commission showed in its decision much evidence, and the United States District Court supported its order because there was so much well-considered evidence in the record that the order could not be held arbitrary. [Italics ours.]"

497 Moreover, after two oral arguments at the bar the court generously allowed counsel for the United States to file a short brief. Point VI, the last paragraph, is as follows:

"The opinion of the District Court for the Southern District of New York (Circuit Judges Hough, Manton, and Mayer) is confirmatory of all that the commission did in the instant case. Akron, Canton & Youngstown Railway Co. v. United States, 282 Fed. Rep. 306.

"The preliminary injunction should be dissolved and the bill should be dismissed."

The final hearing was held at Denver, November 27, 1922. The appeal in The New England Divisions case was not argued before the Supreme Court of the United States until January 11, 1923. The final opinion and judgment of that court was announced on February 19, 1923, or more than two months after the instant case was argued and submitted. While both the main opinion and the dissenting opinion in the instant case indicate that the opinion of the Supreme Court was before this court when it decided this case, it could not well be said that "Neither side claims that the New England Divi-

sions case is controlling or even helpful here," as neither side was ever heard on the subject after the Supreme Court decided the case.

It is respectfully submitted that the opinion of the court neither correctly states the argument of counsel nor gives sufficient consideration to the opinion of the Supreme Court in The New England Division case.

II.

In Dayton-Goose Creek Railway Co. v. United States, in Equity No. 262, United States District Court, Eastern District of Texas, at Beaumont, the District Court (Circuit Judges Walker and King and District Judge Foster) had under submission on briefs and arguments, after a hearing on application for preliminary injunction, and motion of the United States to dismiss the petition, a case in-
498 volving the validity of the so-called recapture clauses of the transportation act.*

The opinion and order denying the application and sustaining the motion were announced and filed March 15, 1923, or one day before the issuance of the permanent injunction in the instant case. The two cases were under submission at the same time. Using

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* Section 422, paragraphs (5) and (6), of the transportation act (41 Stat. 489) provides:

"(5) Inasmuch as it is impossible (without regulation and control in the interest of the commerce of the United States considered as a whole) to establish uniform rates upon competitive traffic which will adequately sustain all the carriers which are engaged in such traffic and which are indispensable to the communities to which they render the service of transportation without enabling some of such carriers to receive a net railway operating income substantially and unreasonably in excess of a fair return upon the value of their railway property held for and used in the service of transportation, it is hereby declared that any carrier which receives such an income so in excess of a fair return shall hold such part of the excess, as hereinafter prescribed, as trustee for, and shall pay it to, the United States.

"(6) If under the provisions of this section any carrier receives for any year a net railway operating income in excess of 6 per centum of the value of the railway property held for and used by it in the service of transportation, one-half of such excess shall be placed in a reserve fund established and maintained by such carrier, and the remaining one-half thereof shall, within the first four months following the close of the period for which such computation is made, be recoverable by and paid to the commission for the purpose of establishing and maintaining a general railroad contingent fund as hereinafter described. For the purpose of this paragraph the value of the railway property and the net railway operating income of a group of carriers, which the commission finds are under common control and management and are operated as a single system, shall be computed for the system as a whole irrespective of the separate ownership and accounting returns of the various parts of such system. In the case of any carrier which has accepted the provisions of section 209 of this amendatory act the provisions of this paragraph shall not be applicable to the income for any period prior to September 1, 1920. The value of such railway property shall be determined by the commission in the manner provided in paragraph (4).

the opinion of the Supreme Court of the United States as a
499 basis for it own opinion, and quoting therefrom, the District Court for Eastern District of Texas said:

"The Congress determined that its powers to regulate interstate commerce must now be exercised to a wider extent than before, in order that an adequate system of interstate transportation should be preserved for the commerce of the country. To that end it greatly enlarged the powers of the Interstate Commerce Commission. It empowered it to group the railroads of the country, to prescribe rates adequate to a fair remuneration of each of the members of such groups, and to order proper divisions of such joint rates. It could also prescribe minimum as well as maximum rates. It could exercise such control over intrastate rates as would prevent discriminations against interstate or foreign commerce. It could control the issuance of railroad securities, the building of additional roads, and the abandonment of existing lines, so far as they were interstate carriers. It could plan and recommend the consolidation of all the railroads of the country into a number of interstate systems, not being necessarily restrained by existing competition.

"The scope of this act and the departure therein from former limitations on the regulation of interstate commerce have been the subject of recent consideration by the Supreme Court of the United States in the case of The Akron, Canton and Youngstown Railway Company et al. v. The United States of America et al. (The New England Divisions case), opinion rendered February 19th, 1923.

"In this opinion it is said:

"'Transportation act, 1920, introduced into the Federal legislation a new railroad policy. Railroad Commission of Wisconsin v. Chicago, Burlington & Quincy R. R. Co., 257 U. S. 563, 585. Theretofore, the effort of Congress had been directed mainly to the prevention of abuses, particularly those arising from excessive or discriminatory rates. The 1920 act sought to insure, also, adequate transportation service. That such was its purpose, Congress did not leave to inference. The new purpose was expressed in unequivocal language. And to attain it, new rights, new obligations, new machinery were created. The new provisions took a wide range. Prominent among them are those specially designed to secure a fair return on capital devoted to the transportation service. Upon the commission, new powers were conferred and new duties were imposed.

500 "'The credit of the carriers, as a whole, had been seriously impaired. To preserve for the nation substantially the whole transportation system was deemed important. By many railroads funds were needed, not only for improvement and expansion of facilities, but for adequate maintenance. On some, continued operation would be impossible unless additional revenues were procured. A general rate increase alone would not meet the situation. There was a limit to what the traffic would bear. A five per cent increase had been granted in 1914, The Five Per Cent case, 31 I. C. C. 351; 32

I. C. C. 325; fifteen per cent in 1917, The Fifteen Per Cent case, 45 I. C. C. 303; twenty-five per cent in 1918, General Order of Director General, No. 28. Moreover, it was not clear that the people would tolerate greatly increased rates (although no higher than necessary to produce the required revenues of weak lines) if thereby prosperous competitors earned an unreasonably large return upon the value of their properties. The existence of the varying needs of the several lines and their widely varying earning power was fully realized.'

"Among other provisions the act provided substantially that all railroads should hold one-half of the excess of net earnings over 6 per cent net on the valuation of its property as fixed by the commission after paying expenses, as trustee for, and pay the same to, the United States. These sums were to be collected by the Interstate Commerce Commission and used by it in furtherance of the public interest in railway transportation either by making loans to carriers to meet expenditures for capital account or to refund maturing securities originally used for capital account, or by purchasing transportation equipment and facilities and leasing the same to carriers'; sums so collected and accretions thereof to constitute a revolving fund to be used for the purposes stated. Transportation act, 1920, section 422, 41 Stat. 456, 488.

" This provision is attacked as unconstitutional, on the ground that it takes the property of the carrier from whom such per cent of excess earning is collected without compensation, and denies to it due
501 process of law, and also on the ground that the requirement, so far as it embraced any earning from intrastate rates, was beyond the power of Congress."

In The New England Divisions case, supra, Mr. Justice Brandeis further said:

" It was necessary to avoid unduly burdensome rate increases and yet secure revenues adequate to satisfy the needs of the weak carriers. To accomplish this two new devices were adopted: The group system of rate making and the division of joint rates in the public interest. Through the former, weak roads were to be helped by recapture from prosperous competitors of surplus revenues. Through the latter the weak were to be helped by preventing needed revenue from passing to prosperous connections. Thus, by marshalling the revenues, partly through capital account, it was planned to distribute augmented earnings, largely in proportion to the carrier's need. This, it was hoped, would enable the whole transportation system to be maintained, without raising unduly any rate on any line. The provision concerning divisions was, therefore, an integral part of the machinery for distributing the funds expected to be raised by the new rate-fixing sections. It was, indeed, indispensable.

" Raising joint rates for the benefit of the weak carriers might be the only feasible method of obtaining currently the needed revenues. Local rates might already be so high that a further increase would kill the local traffic. The through joint rates might be so low that they could be raised without proving burdensome. On the

other hand, the revenues of connecting carriers might be ample; so that any increase of their earnings from joint rates would be unjustifiable. Where the through traffic would, under those circumstances, bear an increase of the joint rates, it might be proper to raise them, and give to the weak line the whole of the resulting increase in revenue. That, to some extent, may have been the situation in New England, when, in 1920, the commission was confronted with the duty, under the new section 15a, of raising rates so as to yield a return of substantially 6 per cent on the value of the property used in the transportation service. Ex parte 74, Increased Rates, 1920, 58 I. C. C. 220."

502 The language of the Supreme Court with respect to "weak lines," their "prosperous competitors," the "widely varying earning power of the several lines" and "their varying needs," the "recapture from prosperous competitors of surplus revenues," how "the weak were to be helped by preventing needed revenue from passing to prosperous connections," and thus "by marshalling the revenues," it was planned "to distribute augmented earnings" which "would enable the whole transportation system to be maintained," is all highly appropriate here.

What was said in the opinion of the Supreme Court respecting the scope of the transportation act and the various sections thereof was made after full discussion of all of those subjects at the bar and after solemn deliberation thereon by the court. It is submitted that the opinion is just as conclusive of the validity of the order in the instant case as if the order had been the immediate subject of the controversy.

If the court thinks otherwise, then it is submitted that the opinion in The New England Divisions case is so highly persuasive as to be controlling.

III.

The transportation act is entitled, "An act" (a) "to provide for the termination of Federal control * * *"; (b) "to provide for the settlement of disputes between carriers and their employees;" (c) "to further amend" the act to regulate commerce of 1887, as amended (41 Stat. 456), approved February 28, 1920. It consists of five titles, viz. I.—Definitions; II.—Termination of Federal control; III.—Disputes between carriers and their employees and subordinate officials; IV.—Amendments to interstate commerce act; V.—Miscellaneous provisions.

Inter alia, in order "to best promote the service in the interest of the public and the commerce of the people" (41 Stat. 476, 477); to "best meet the emergency and serve the public interest," * * * "properly to serve the public" (41 Stat. 477); "that the public interest will be promoted" (41 Stat. 482); to consider "the transportation needs of the country" (41 Stat. 488); to meet the necessity of enlarging the facilities "in order to provide the people of

503 the United States with adequate transportation" (41 Stat. 488); "in the interest of the commerce of the United States as

a whole" (41 Stat. 489); to enable the carriers "properly to meet the transportation needs of the public" (41 Stat. 491), the Congress of the United States, in enacting the transportation act of 1920, proceeded along comprehensive lines.

In enacting the transportation act the Congress considered the transportation system throughout the continental United States as a whole. The Congress enacted the broad provisions to raise revenue, to prescribe divisions, to provide for settlement of disputes between carriers and their employees, to recapture excess earnings, and for other equally important purposes (Railroad Commission of Wisconsin v. C., B. & Q. R. R. Co., 257 U. S. 563; State of New York v. United States, 257 U. S. 591; Lehigh Valley Railroad Co. v. Public Service Commission, 272 Fed. Rep. 758, 767; City of New York v. United States, 272 Fed. Rep. 768; New England Divisions case, 282 Fed. Rep. 306; affirmed New England Divisions case, No. 646, Supreme Court, October Term, 1922, decided February 19, 1923; Pennsylvania Railroad v. Railroad Labor Board, No. 585, Supreme Court, October Term, 1922, decided February 19, 1923), in order to maintain an adequate transportation system throughout the United States.

In its entire history the Congress never passed an act in which the sections were so closely interlocked and dependent each upon the other as in the case of the transportation act, as the Congress was considering "the transportation needs of the country."

In cases thus far decided both the District Courts and the Supreme Court, in approaching the subject, have persistently exercised the judicial power with a scope coextensive with that of the congressional enactment and have kept the entire transportation act and all of the carriers subject thereto in full view at all times, to the end that all of the incidents to the development of an adequate transportation system may move forward at once and together.

504 In view of the statement of the court that the counsel did not rely on The New England Divisions case in the instant case, and as counsel will rely on that opinion in the Supreme Court, in the event of an appeal, it is but fair to the court and to the counsel that the cause should be reargued here.

In view of the foregoing considerations, the Government respectfully prays that a rehearing be granted herein or that the opinion be modified.

JAMES M. BECK,
Solicitor General.
BLACKBURN ESTERLINE,
Assistant to the Solicitor General.

I certify that in my opinion the foregoing petition is well founded.

BLACKBURN ESTERLINE,
Assistant to the Solicitor General.

[File endorsement omitted.]

505 In United States District Court.

Answer of carriers to the petition of the United States for rehearing.

Filed June 16, 1923.

I.

The United States files a petition for rehearing on the ground that the decision (February 19, 1923) of the Supreme Court in the New England Division case (Akron, etc., v. United States, — U. S. —), as well as the decision of the district trial court, was " not sufficiently considered."

As the decision in the case at bar turns upon a lack of evidence to support the order of the commission, and as the commission's record and the record of the United States District Court in the New England case disclose oral and documentary evidence without limit on nearly every aspect of the subject of divisions, this court would have " sufficiently considered " the decision in the New England case had it altogether omitted reference to it.

Again, the New England case was totally dissimilar to this in that the carriers petitioning for better divisions had for half a century or more been solvent and successful. They were not asking for financial help as such—they complained only of an unfair division of the day's pay on the basis of work performed by each. That issue, the only one properly in a division case, did not appear at all in the case at bar.

In view of the foregoing there was nothing decided by the Supreme Court in the New England case relevant to the commission's order or the court's decision in this case. Therefore, what the Supreme Court said in that case was no more applicable to the issue decided here than what it said in some patent case or a case in admiralty.

The assumption of counsel for the United States that the decision in the New England case was " not sufficiently considered " is based upon this remark of the court in the case at bar (p. 17 of printed opinion):

" Neither side claims that the New England Divisions case (66 I. C. C. 196, 282 Fed. 306) is controlling or even helpful here. It was said by the court in 282 Fed. 313: ' The question before
506 the commission was the apportionment of the joint fund in proportion to the services rendered.' The divisions there under consideration had stood for thirty years, the relations of the carriers to the joint service and the advantages and burdens imposed on each had greatly changed, the grounds on which the New England roads asked relief were definitely set out, wherein the changed conditions to their relative disadvantage is made to appear, and the District Court said the evidence sustained the claim."

Notice carefully the words of the eastern court quoted by this court: "In proportion to the services rendered." That is the subject matter of a division case. The proportion and value of work done by the respective carriers were not ascertained in the case at bar.

In the foregoing statement of the circumstances and conditions characterizing the New England case this court shows clearly the fundamental differences between that case and the one here. In the present case the question before the commission was not of the apportionment of the joint fund in proportion to the services rendered; the divisions had not stood for thirty years; the relations of the carriers to the joint service and the advantages and burdens imposed on each had not greatly changed; there was no evidence here to support the order as there was in the New England case.

That is what the court in this case means by saying that neither side claims the New England case to be decisive—it could not be decisive when the record made there bears no resemblance to the record here.

But counsel for the United States read in oral argument from the District Court's opinion in the New England case with the purpose of making the deduction that since there was evidence to support the commission's order in the eastern case there must necessarily have been evidence in the case at bar. At least, we could see no other purpose in the reading.

On the other hand, we referred to the New England case at page 54 of our opening brief and stated that we relied upon it even more confidently than counsel for the Government did, not as decisive of any legal question before this court, but as illustrating that the commission knew perfectly well how to try a division case. As it knew perfectly well how to try a division case, why did it not in the
507 case at bar require evidence on divisions that were unreasonable or inequitable under the law to the Orient? To that proposition we cited the New England case, not that it decided any question in this case, but that it illustrated how very badly this case was tried by the commission. We used the New England case to show that there the commission's record contained very full information of divisions themselves, of their remaining unchanged for thirty years, of the radical changes in transportation conditions, of the short hauls in New England (akin to costly switching in some instances), and—most important of all—of the relative service done or work performed by the carriers participating in the division of a rate. All those essentials, we argued, fully covered by evidence in the New England case, were missing from the Orient case.

In the eastern case the commission rendered a decision favorable to the New England carriers only upon the matters respecting which adequate evidence had been presented, very explicitly refusing relief where the evidence was insufficient. We believe that what the commission stated in the New England case, and what the District Court

found in the record, went to show that the commission knew better than *to make such a record as it had made in the case at bar.*

But we did not, as said before, rely upon the New England case as decisive of any legal question before this court, for the issues joined and the facts of procedure made the cases as dissimilar as are white and black.

II.

Nor does anything that was said (March 15, 1923) by the three-judge District Court of the United States for the Eastern District of Texas, in Dayton-Goose Creek Railway Company v. United States, — Fed. —, cited by counsel for the Government, have any bearing on the case at bar. The Dayton-Goose Creek case is just as dissimilar to the case before us as one case could be unlike another. It involved simply the question of the constitutionality of the miscalled "recapture" provisions of section 422 of the transportation act (41 Stat. 489), which is section 15a of the interstate commerce act.

508 As it appeared by admission of plaintiff in the Dayton-Goose Creek case that the complainant company had earned in excess of six per cent and was therefore bound to yield up the trust fund if the provision of the law was constitutional, there was involved nothing like the question of the sufficiency of the evidence in the case at bar. Therefore, the language of the District Court from which counsel for the Government quotes at page 7 of the petition for rehearing, which language deals with the "wide powers" that Congress intended the commission to have, does not mean that Congress intended to give to the commission power to make an order without evidence to support it.

Nor does anything quoted by the District Court of Texas from the Supreme Court of the United States in the Wisconsin case (Railroad Com., etc., v. C. B. & Q., 257 U. S. 563) regarding the purpose of Congress to insure adequate transportation service contain anything suggesting that the national legislature intended to set aside the holding in the Louisville & Nashville case (227 U. S. 88), namely, that a record fully sustaining the order of the commission must be made by the commission in the presence of the defendant carriers.

The Wisconsin case did not involve divisions even indirectly. The question was of the constitutional power of Congress to remove discrimination "as between persons and localities" and "against interstate or foreign commerce" arising out of State rates. Therefore all language in the opinion respecting the enlarged powers of the commission relates, not to the question decided in the case at bar, but to the constitutional question there decided. The "enlarged powers" under which the commission acted in the Wisconsin case are given in section 14 (4) of the interstate commerce act, while

the powers exerted in the case at bar are bestowed by section 15 (6).

And the power under consideration by the District Court in the Dayton-Goose Creek case is granted by section 15a (6).

So the language in a decision of a case arising under section 14 (4), or in a case springing from section 15a (6), has weight only in the connection used—it is perversion to apply it to a case brought under section 15 (6).

509 "The opinion of a court must always be read in connection with the facts upon which it is based." Doyle v. Continental, etc., 94 U. S. 535 (538).

"But these expressions are to be understood in their application to the facts of the cases decided." Hanover, etc., v. Metcalf, 240 U. S. 403 (415).

General expressions are to be taken in connection with the case in which they are used. Cohens v. Virginia, 6 Wheat. 264 (398).

The Supreme Court of the United States has often expressed disapproval of the practice of separating its language from the context and quoting it in dissimilar cases.

III.

Finally, the decision of the Supreme Court of the United States in the New England Division case, quoted at page 10 of the petition for rehearing, merely discusses the new plan of Congress to insure earnings to weak as well as strong carriers and to prevent, by a return of earnings held in trust, excessive revenue to the more fortunate or powerful lines in a rate group. But nothing is contained in the language quoted or found elsewhere in the opinion of the Supreme Court justifying a record by the commission in a division case without evidence to support it.

What has been said disposes of the matter contained in Division III of the petition of the Government for rehearing about the transportation act, "in which the sections were so closely interlocked and dependent each upon the other." In that act Congress betrayed no intention of overturning the rules and practices prevailing in trials wherever the English language is used. It is now more than ten years since the Supreme Court held in the Louisville & Nashville case (227 U. S. 88) that "the more liberal the practice in admitting testimony" before the Interstate Commerce Commission, "the more imperative the obligation to preserve the essential rules of evidence by which rights are asserted or defended." It is certainly significant that in no legislation since 1913 has Congress so much as hinted that the venerable trial practice of Englishmen and Americans should be in the least modified, to say nothing of being abrogated altogether. Such a

510 change can not be thought of until it is found ordered in the clearest of language—it can not be inferred from general ex-

pressions contained in cases dealing with subject matters entirely alien to that disposed of by the court in this case.

J. M. WAGASTAFF,
W. R. SMITH,
T. J. NORTON,
W. F. DICKINSON,
LUTHER BURNS,
ORVILLE BULLINGTON,
KENNETH F. BURGESS,
J. H. BARWISE, Jr.
FRED H. WOOD,
GARDINER LATHROP,
O. E. SWAN,
C. S. BURG,
W. W. BROWN,
C. C. HUFF,
H. H. LARIMORE,
W. P. WAGGENER,
W. F. EVANS,
M. G. ROBERTS,
R. R. VERMILION,
GEORGE THOMPSON,
J. M. BRYSON,
Solicitors for all Plaintiffs.

[File endorsement omitted.]

511 In United States District Court.

Order denying motion for rehearing.

Filed May 2, 1923.

The motion of defendant, United States of America, for a rehearing in this cause came on to be heard, and on consideration thereof: It is ordered that said motion be and the same is denied and overruled.

ROBT. E. LEWIS,
Circuit Judge.
T. BLAKE KENNEDY,
District Judge.
J. FOSTER SYMES,
District Judge.

[File endorsement omitted.]

512 In United States District Court.

Petition for appeal by United States of America and Interstate Commerce Commission.

Filed May 9, 1923.

United States of America, defendant, and Interstate Commerce Commission, intervening defendant, feeling themselves aggrieved by the final order or decree of the District Court dated March 16, 1923, pray an appeal to the Supreme Court of the United States therefrom. The particulars wherein they consider the final order or decree erroneous are set forth in the assignment of errors on file to which reference is made.

Defendants pray that the transcript of the record, proceedings and papers on which the final order or decree was made and entered, duly authenticated, may be transmitted forthwith to the Supreme Court of the United States.

AL F. WILLIAMS,
United States Attorney, District of Kansas, Second Division.
BLACKBURN ESTERLINE,
Assistant to the Solicitor General.
J. CARTER FORT,
Solicitor for Interstate Commerce Commission.

[File endorsement omitted.]

513 In United States District Court.

Assignment of errors by and on behalf of the United States of America and Interstate Commerce Commission.

Filed May 9, 1923.

United States of America, defendant, and Interstate Commerce Commission, intervening defendant, now come by their respective counsel and in connection with the petition for appeal, file the following assignment of errors on which they will rely on their appeal to the Supreme Court of the United States from the final order or decree of the District Court dated March 16, 1923.

The District Court erred:

I. In issuing the temporary injunction.

II. In not sustaining the motion of the United States to dismiss the bill for injunction.

III. In overruling the motion of the Interstate Commerce Commission to dismiss the bill for injunction and in not sustaining the motion.

IV. In deciding, holding, and adjudging as follows:

" Both respondents have filed motions to dismiss and it is claimed that they should be sustained because this proceeding was pre-
514 maturely brought. It is argued that inasmuch as section 16-a of the act gave the plaintiffs the right to apply to the commission for a rehearing, that remedy should have been exhausted before this suit could be instituted. The application for a rehearing does not operate to stay the execution of the commission's order. The act provides that it be not stayed on such an application unless the commission by special order grants a stay. Nothing could have been done by plaintiffs pending application for rehearing that would have stayed the execution of the order as a matter of right. We think plaintiffs were entitled to take the order as final for the purpose of this proceeding. (See Chicago Ry. Co. v. Illinois Commerce Co., 277 Fed. 970.)"

V. In deciding, holding, and adjudging as follows:

" There is no evidence in the record as to what the divisions of tariffs between the plaintiffs, or any of them, and the Orient were,

unless those facts, necessary as a basis to support the commission's order, can be gleaned from the exhibits. There is no evidence in the record as to the amount and cost of service rendered by plaintiffs in the handling of interchange traffic, or any other proof tending to show that their proportions of divisions therefor were 'unjust, unreasonable, inequitable, or unduly preferential or prejudicial' as between plaintiffs and the Orient, nor that the divisions prescribed by the commission in its order are 'just, reasonable, and equitable' divisions as between them, unless those facts also can be adduced from some of the exhibits. Confessedly, from the arguments of counsel and their briefs, the issue comes down to the inquiry whether or not the necessary facts in support of the commission's order can be found in the exhibits. Otherwise, there is no proof on which the order can be rested. The necessities of a carrier, and the fact that it is being operated at a deficit, has been repeatedly held by the commission to not be a sufficient ground on which to order an increase of divisions in favor of the failing carrier. The building of a line into nonsupporting territory or into a field already adequately served can not be justly debited to other carriers, and as between the latter the fact that some have immediate connections seems wholly negligible as a ground of distinction. Federal V. R. R. Co. v. Toledo & Ohio Ry. Co., 68 I. C. C. 499; Laona & L. R. Co. v. Milwaukee S. P. & S. S. M. Ry. Co., 52 I. C C. 7; McGowan-Foshee L. Co. v. Florida A. & G. R. Co., 51 I. C. C. 317. Participating carriers in a joint service are entitled to be compensated in proportion to the amount of service and the cost of the service which they each render, and the fact that one of them is prosperous and the other not will not override the just right of each to a fairly proportionate share out of the joint earnings, whether the amount distributed to each be fully compensatory or be less to each than the value of the services so rendered. Pittsburgh & W. Va. Ry. Co. v. Pittsburgh & Lake Erie Co., 61 I. C. C. 272; New England Divisions case, 66 I. C. C. 196.

515 VI. In deciding, holding, and adjudging as follows:

"We appreciate the fact that the ability of the commission to make proper deductions and conclusions from statistics embodied in these exhibits, with which it is their duty to constantly deal, is far greater than ours; but after prolonged study of these exhibits we have been unable to find in them any proof which in our judgment tends to show what the existing divisions were, or to support a conclusion that those divisions are unjust, unreasonable, inequitable, or unduly preferential or prejudicial as between the participating carriers."

VII. In deciding, holding, and adjudging as follows:

"The annual reports from which the commission obtained and used its data as proof covered all of the business of the 13 plaintiffs, both freight and passenger, the lines of some of them extending through many States—one from Chicago to California, and others serving territory equal in extent—and we are unable to understand

how the deductions made by the commission from the annual reports may be considered to any extent as a helpful guide in determining whether the divisions of freight rates on traffic interchanged with the Orient were unfair or inequitable, or as contributive facts in determining just and equitable divisions between them. We think they added nothing to the facts in the record for the solution of the issue before the commission under section 15(6) of the act. It seems to us that the inquiry was not directed to an ascertainment of the relative amount and cost of service on interchange traffic as between the Orient and the plaintiffs, and that there is no proof, including the annual reports, which will sustain a conclusion that existing divisions were unjust and inequitable at the time the order was made. The order is said to be of the blanket type. It cut through all existing divisions alike and took from each carrier a uniform per cent and added it to the Orient's share under the old divisions. A comparison of those per cents with the per centums of railway operating income discloses that the greater the income of plaintiffs the greater the increase allowed the Orient by deductions from the more prosperous roads. This was the method of relief proposed by the Orient in its application."

VIII. In deciding, holding, and adjudging as follows:

"So that it seems obvious to us that the phrase in paragraph 6 so much relied upon intends that all of the subjects named for consideration have application only where the inquiry goes to the extent of both fixing and dividing the joint rates; and that where it extends only to a division of existing rates, some of the things named for consideration by the commission have no relevancy to or weight in determining what the new divisions shall be. In such an investigation we think the controlling inquiry must necessarily
516 be directed to ascertaining the amount and cost of service to each of them. It is not shown that the Orient maintains switching and terminal facilities for joint use, or is otherwise specially burdened at points of exchange, or that it is put to unusual expense in the joint service. It does show it makes empty hauls; but that, we take it, is true of all roads, especially when there is heavy movement to market. It is said that none of the territory along its line produces coal and lumber, and that it must receive those commodities, which it is required to use, from its connections at a charge for their service; but, so far as the proof discloses, that may be true also of some or all of the plaintiffs. In short, we find no facts in the record which sustain the order, except the broad proposition, amply supported by proof, that the Orient is not self-sustaining and needs help; but we can not assent that the commission is empowered to compel prosperous roads, because they are prosperous, to contribute their services to the sustenance of weak roads, because they are weak. The character of the inquiry and the character of the order force us to the conclusion that that was what the commission intended to do and did do."

IX. In deciding, holding, and adjudging as follows:

"Neither side claims that the New England Divisions case (66 I. C. C. 196, 282 Fed. 306) is controlling or even helpful here. It was said by the court in 282 Fed. 313: 'The question before the commission was the apportionment of the joint fund in proportion to the services rendered.' The divisions there under consideration had stood for thirty years, the relations of the carriers to the joint service and the advantages and burdens imposed on each had greatly changed, the grounds on which the New England roads asked relief were definitely set out, wherein the changed conditions to their relative disadvantage is made to appear, and the District Court said the evidence sustained the claim. On appeal of that case the Supreme Court said (opinion filed Feb. 19): 'An order, regular on its face, may, of course, be set aside if made to accomplish a purpose not authorized. * * * It is not true, as argued, that the order compels the strong railroads to support the weak,' and that the increase given to the New England lines on the new division was all paid out of the rate increase ordered in Ex parte 74; and in a footnote: 'Papers on the commission's files are not a part of the record in a case, unless they are introduced as evidence.'"

X. In deciding, holding, and adjudging as follows:

"It follows that the annual reports and the data which they contain were not made a part of the record, and were not properly before the commission for consideration in reaching its conclusion."

517 And then considering, of its own motion, the annual reports and the data which they contain or as compiled therefrom as not sufficient evidence or any evidence to support the order of the commission, thus substituting the judgment of the court for that of the commission on whether (1) the reports were before the commission and (2) the effect thereof.

XI. In deciding, holding, and adjudging that the annual reports and the data which they contain or as compiled therefrom were not a part of the record before the commission for the purpose of sustaining the order and then considering the same as a part of the record before the court for the purpose of annulling and enjoining the order.

XII. In deciding, holding, and adjudging that the order of the commission is invalid because of failure to join other carriers who participated in the joint rates affected by the order.

XIII. In deciding, holding, and adjudging that the order of the Interstate Commerce Commission was without substantial evidence to support it.

XIV. In deciding, holding, and adjudging that the order of the Interstate Commerce Commission, entered August 9, 1922, was beyond its power.

XV. In entering the following final order or decree, viz:

"After final hearing of this cause, including arguments of counsel for all of the respective parties, it was submitted to the court with

leave to file briefs, which have been considered, and the court being now fully advised in the premises, it finds the issues in favor of plaintiffs, whereupon,

"It is considered, ordered, and decreed that the temporary injunction heretofore granted be and the same is now made permanent and perpetual, and the defendants and all persons acting in their behalf are forever prohibited and enjoined from enforcing against the plaintiffs, and each of them, and their respective representatives, agents, and servants the said order made by the Interstate Commerce Commision, division 4, on the 9th day of August, 1922, wherein it found and ordered that the then existing divisions on freight traffic interchanged should be diminished as to the plaintiffs and in-
518 creased in favor of the Kansas City, Mexico & Orient Railroad Company and its receiver, and the Kansas City, Mexico & Orient Railway Company of Texas, in the percentages of said existing divisions as in said order set forth.

"It is further ordered that the permanent writ of injunction may issue from the clerk's office on application of plaintiff, or either of them, commanding as aforesaid.

"It is further ordered that unless there be reversal on appeal from this decree, plaintiffs and their surety be and they are released from all obligation on their bond heretofore given in this cause, and that none of the parties hereto shall recover its costs.

"This 16th day of March, A. D. 1923."

XVI. In not granting the petition for rehearing seasonably filed.

Wherefore, defendants, and each of them, pray that the final order or decree of the District Court may be reversed, annulled, and set aside, with directions that the interlocutory and permanent injunctions shall be dissolved and the bill for injunction dismissed, and for such other and further order as may be appropriate.

AL F. WILLIAMS,
United States Attorney, District of Kansas, Second Division.
BLACKBURN ESTERLINE,
Assistant to the Solicitor General.
J. CARTER FORT,
Solicitor for the Interstate Commerce Commission.

[File endorsement omitted.]

519 In United States District Court.

Notice to attorney general of State of Kansas of appeal.

Filed May 9, 1923.

To the Honorable Charles B. Griffith, attorney general of the State of Kansas:

You are hereby notified that the defendants above named have taken an appeal from the final decree of the District Court to the Supreme Court of the United States and that the order allowing

the appeal makes the same returnable within thirty (30) days from the date of the order.

This notice is given you pursuant to Urgent Deficiencies Act, October 22, 1913 (38 Stat. 221).

AL F. WILLIAMS,
United States Attorney, District of Kansas, Second Division.
BLACKBURN ESTERLINE,
Assistant to the Solicitor General.

MAY 1, 1923.

Service of a copy of the within notice is hereby admitted and acknowledged this 8th day of May, 1923.

CHARLES B. GRIFFITH,
Attorney General of Kansas.
By JOHN G. EGAN,
Asst. Atty. Genl. of Kansas.

[File endorsement omitted.]

520 In United States District Court.

Order allowing appeal of United States of America and Interstate Commerce Commission.

Filed May 12, 1923.

In the above-entitled cause, United States of America, defendant, and Interstate Commerce Commission, intervening defendant, having made and filed their petition praying an appeal to the Supreme Court of the United States from the final order or decree of the District Court, and having also made and filed an assignment of errors, and having in all respects conformed to the statute and rules of court in such case made and provided:

It is ordered and decreed that the appeal be, and the same is hereby, allowed as prayed and made returnable within thirty (30) days from the date hereof, and the clerk is directed to transmit forthwith a properly authenticated transcript of the record, proceedings, and papers on which said order or decree was made and entered to the Supreme Court of the United States.

May 10, 1923.

ROBT. E. LEWIS,
United States Circuit Judge, and Presiding Judge in the Above-entitled Cause.

[File endorsement omitted.]

521 In United States District Court.

Order enlarging time for docketing appeal and filing record.

Filed May 12, 1923.

The record being voluminous and good cause being shown, it is ordered that the time within which the appellants shall docket the appeal and file the transcript of record thereof with the Clerk of

the Supreme Court of the United States be, and the same is hereby, enlarged and extended until July first, 1923.

ROBT. E. LEWIS,
United States Circuit Judge, and Presiding Judge in the Above-entitled Cause.

[File endorsement omitted.]

In United States District Court.

Præcipe for record.

Filed May 31, 1923.

To the Clerk:

Please prepare a transcript of the record in the above-entitled cause in the matter of the appeal of the United States
522 of America and the Interstate Commerce Commission and include therein, in the order given below, the following matter, viz:

1. Bill for injunction.
2. Motion of the United States to dismiss and answer of the United States.
3. Motion to dismiss and answer of the Interstate Commerce Commission.
4. Certified copy of the record before the Interstate Commerce Commission in a proceeding entitled "Kansas City, Mexico & Orient Division," No. 13,668.
5. Order granting application for temporary injunction.
6. Testimony and exhibits introduced at final hearing.
7. Opinion of the court and dissenting opinion.
8. Final decree.
9. Journal entries in their appropriate order.
10. Petition for rehearing.
11. Answer of the carriers to petition for rehearing.
12. Petition for appeal.
13. Assignment of errors.
14. Order allowing appeal.
15. Order extending time to prepare transcript and docket appeal.
16. Notice of appeal to Attorney General of Kansas.
17. Præcipe for record.
18. Citation.

BLACKBURN ESTERLINE,
Assistant to the Solicitor General.
J. CARTER FORT,
Solicitor for Interstate Commerce Commission.

Service of a copy of the within præcipe for record is hereby admitted and acknowledged this 28 day of May, 1923.

T. J. NORTON,
M. G. ROBERTS,
Solicitors for Appellees.

523 [File endorsement omitted.]

In United States District Court.

Order enlarging time for docketing appeal and filing record.

Filed June 22, 1923.

The record being voluminous and good cause being shown, it is ordered that the time within which the appellants shall docket the appeal and file the transcript of record thereof with the Clerk of the Supreme Court of the United States be, and the same is hereby, enlarged and extended until August first, 1923.

ROBERT E. LEWIS,
United States Circuit Judge, and Presiding Judge in the Above-entitled Cause.

O. K.:
T. J. NORTON,
M. G. ROBERTS.

[File endorsement omitted.]

524 *Clerk's certificate.*

UNITED STATES OF AMERICA,
District of Kansas, Second Division, ss:

I, F. L. Campbell, clerk of the United States District Court for the District of Kansas, Second Division, do hereby certify that the foregoing is a true, full, and complete transcript of the pleadings, proceedings, and record as the same are designated in the præcipe for record, stipulations of counsel, and order of the court for the settlement of the transcript of the record for the appeal to the Supreme Court of the United States, in a certain case in equity, wherein the Abilene and Southern Railway Company et al. are plaintiffs and The United States of America is defendant, and the Interstate Commerce Commission is intervening defendant, Number 278–N, as fully as the same remain on file and of record in said cause in my office.

And I further certify that the original citation is prefixed hereto and returned herewith.

In testimony whereof, I have hereunto set my hand and affixed the seal of said Court, at my office in the city of Wichita, in said district, this 20th day of July, A. D. 1923.

[SEAL.]

F. L. CAMPBELL,
Clerk U. S. District Court.
By ELIZABETH LINTON,
Deputy Clerk.

525 In the Supreme Court of the United States,

October term, 1923.

[Title omitted.]

Stipulation as to parts of record to be printed.

Filed Nov. 27, 1923.

By their respective counsel the parties stipulate that the appellants shall furnish to the clerk for the use of the court and the clerk in the hearing of this appeal a sufficient number of printed copies of the exhibit styled "Certified copy of the record before Interstate Commerce Commission in a Proceeding Entitled 'Kansas City, Mexico & Orient Divisions, No. 13668,'" and that in printing the transcript the clerk may omit the reprinting of that exhibit.

BLACKBURN ESTERLINE,
Assistant to the Solicitor General.
J. CARTER FORT,
Solicitor for Interstate Commerce Commission.
T. J. NORTON,
M. G. ROBERTS,
Solicitor for all Appellees.

[File endorsement omitted.]

(Indorsement on cover:) File No. 29,766. Kansas D. C. U. S. Term No. 456. The United States of America and Interstate Commerce Commission, appellants, vs. Abilene & Southern Railway Company, The Atchison, Topeka & Santa Fe Railway Company, The Chicago, Rock Island & Pacific Railway Company, et al. Filed July 25th, 1923. File No. 29,766.

○

CONTENTS.

ARGUMENT—Continued.

TABLE OF CASES.

In the Supreme Court of the United States.

OCTOBER TERM, 1923.

THE UNITED STATES OF AMERICA AND Interstate Commerce Commission, appellants, *v.* ABILENE & SOUTHERN RAILWAY COMPANY, The Atchison, Topeka & Santa Fe Railway Company, et al., appellees.	No. 456.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF KANSAS.

BRIEF FOR INTERSTATE COMMERCE COMMISSION.

STATEMENT OF THE CASE.

This is an appeal by the United States and the Interstate Commerce Commission from a final decree of the United States District Court for the District of Kansas,[1] perpetually enjoining the enforcement of an order made by the Interstate Commerce Commission, Division 4, in *Kansas City, Mexico & Orient Divisions*, 73 I. C. C. 319.

[1] Hon. Robert E. Lewis, Circuit Judge; Hon. J. Foster Symes and Hon. Thomas Blake Kennedy, District Judges; sitting as a special three-judge court under the provisions of the Urgent Deficiencies Act, October 22, 1913, c. 32, 38 Stat. 208, 219, 220.

The order fixed divisions of joint rates between the Kansas City, Mexico & Orient Railway Company of Texas and the Receiver of the Kansas City, Mexico & Orient Railroad Company on the one hand, and each of the thirteen railroad companies which are their direct connections on the other.

The railway line of the Kansas City, Mexico & Orient Railroad Company extends from Wichita, Kans., southwesterly across the States of Kansas and Oklahoma to the Texas state line, where it joins the railway line of the Kansas City, Mexico & Orient Railway Company of Texas, which extends from that point southwesterly to Alpine, Tex., near the Mexican border. The railroad properties of the two companies are operated as a single system of railway, called herein the "Orient." The receiver of one company is the president of the other, and the two companies have the same general officers. The system line of the Orient is 737 miles in length and represents an investment, in road and equipment, minus depreciation, of $28,848,090.93, of which the investment in the properties of the Texas Company is $6,878,360.62 and the investment in properties of the other company is $21,969,730.31. (Rec.[1] p. 10, 11; Record before the Commission,[1] pp. 96, 97.)

The line of the Orient passes through a relatively undeveloped country and the density of its traffic is accordingly relatively light. Nevertheless, it han-

[1] The record of the proceedings before the Commission is a part of the record here, but is printed separately and will be referred to as the "Record before the Commission."

dles an important and considerable volume of business. In 1921 its freight revenue was $3,449,490.83, passenger revenue $382,041.04, mail revenue $91,820.54, and express revenue $60,949.19; 21,135 cars of freight originated on its line and 22,634 cars of freight were delivered to it by connections. (Record before the Commission, pp. 268, 275, 276.) In 1921 the Orient performed 185,410,508 ton-miles of transportation. The principal commodities which originate on its line are livestock, which constitutes 29.99 per cent of the total traffic originated; grain, 24.3 per cent; plaster, 12.58 per cent; and cotton, 9.04 per cent. It is estimated that an area of about 23,272 square miles with a population of approximately 500,000 is tributary to the Orient and served by it. The value of farm lands thus served is $204,250,000.00. The road operates through 4 counties in Kansas, 8 in Oklahoma, 16 in Texas; and serves 13 county seats, of which 5 are served exclusively. In Kansas and Oklahoma there are grain elevators at all stations on its line, and in southern Oklahoma there are several cotton gins. A cement plaster mill at Hamlin, Tex., is served exclusively by the Orient. (Rec. p. 13; Record before the Commission, p. 275.)

Originally it was planned to build a line from Kansas City, Mo., to the Pacific coast at Topolobampo Bay, Mexico, a short line from the midwest to the Pacific Ocean. Construction was begun at various points in 1901-2. Certain parts of the line in Mexico have been built and are in operation, but the line as

projected has not been completed. Work on the Mexican lines was suspended in 1908 as a result of political conditions in Mexico. The Commission did not fix the divisions to be received by the Mexican lines which are in no way involved in this case. They are not owned or operated by either the Kansas City, Mexico & Orient Railroad Company or the Kansas City, Mexico & Orient Railway Company of Texas, and form no part of the Orient as that term is used here. (Rec., pp. 10, 11.)

The lines in the United States, as originally contemplated, were completed in 1913, with the exception of the line between Kansas City and Wichita which has not yet been built because it has been impossible to raise the necessary capital. (Record before the Commission, p. 100.) As various parts of the line in the United States were completed they were put into operation.

Under rates and divisions, in effect at the time of the hearing, the Orient failed to earn operating expenses by very large amounts. Eighty-four per cent of its freight revenue is derived from business interchanged with its connections and moving on joint rates. (Record before the Commission, p. 294.) For the calendar year 1920, the operating deficit was $1,470,106.97; for the year 1921, $860,-740.81; and for the first four months of 1922, $340,-606.00. For the years 1918 and 1919, during the period of Federal control, the operation of the Orient also showed large deficits. However, during the three year period, 1915, 1916, and 1917, prior to

Federal control, the Orient earned its operating expenses and slightly more. (Rec., pp. 12, 14.)

The line of the Orient is so situated that it can be used as a part of through routes for handling east and west traffic, including transcontinental traffic, and also north and south traffic to and from Texas ports and other important points. (Record before the Commission, pp. 113–123, 280–289.)

The points of interchange between the Orient and its direct connections are as follows:

Connecting line.	Points of connection.
Missouri Pacific	Wichita and Anthony, Kans.
Chicago, Rock Island & Pacific	Wichita and Anthony, Kans., and Clinton, Okla.
Atchison, Topeka & Santa Fe	Wichita and Anthony, Kans.
St. Louis-San Francisco	Wichita, Kans., Clinton and Altus, Okla.
Midland Valley	Wichita, Kans.
Clinton & Oklahoma Western	Clinton, Okla.
Wichita Falls & Northwestern	Altus, Okla.
Fort Worth & Denver City	Chillicothe, Tex.
Missouri, Kansas & Texas of Texas	Hamlin, Tex.
Abilene & Southern	Hamlin, Tex.
Texas & Pacific	Sweetwater, Tex.
Gulf, Colorado & Santa Fe	Sweetwater and San Angelo, Tex.
Galveston, Harrisburg & San Antonio	Alpine, Tex.

(See the map folded in at end of this brief.)

PROCEEDINGS BEFORE THE COMMISSION.

The proceeding before the Commission which resulted in the order under attack was instituted by an order of investigation entered by the Commission on April 3, 1922, upon joint application of the Kansas City, Mexico & Orient Railway Company of Texas and the Receiver of the Kansas City, Mexico & Orient Railroad Company. (Record before the Commission, p. 3.)

The order instituting the investigation reads in part as follows (Record before the Commission, p. 63):

> *It is ordered*, That an investigation be, and it is hereby, instituted for the purpose of inquiring into said matter, and particularly to determine whether or not the divisions of joint rates, fares, and charges on traffic interchanged between the said applicants and other carriers subject to the interstate commerce act are unjust, unreasonable, inequitable, or unduly preferential or prejudicial, within the meaning of paragraph (6) of section 15 of said act; and if so, the just, reasonable, and equitable divisions thereof that should be received by the several carriers.

All of the direct connections of the Orient, as well as certain other lines in the Southwest which do or may participate in joint rates with the Orient, were named as respondents in the order. The order of investigation required the Orient and the respondent carriers to furnish to the Commission certain information concerning the interchange traffic of the Orient. The requirement was as follows (Record before the Commission, pp. 65, 66):

> *It is further ordered*, That said applicants, as a whole, shall file with this Commission, on or before the date of said hearing, a statement showing the number of tons and ton-miles of freight transported on their lines and interchanged with each of said respondents, moving under joint rates, for the year ended December 31, 1921; said statement to be so compiled as to show separately the number of

tons and of ton-miles of freight originating at or destined to points on the lines of said applicants and of freight as to which said applicants, as a whole, are an intermediate carrier; and in each case the revenues accruing to said applicants and, so far as practicable, the tons, ton-miles, and revenues of each of said respondents in respect of said traffic. Said statement shall further show separately the number of tons and of ton-miles of such freight received from, and the number of tons and ton-miles of such freight delivered to, each of said respondents having immediate connection with applicants' lines, at each point of interchange, and the direction of movement, whether received from or delivered to said respondents.

It is further ordered, That each respondent shall file with this Commission, on or before the date of said hearing, a statement showing the number of tons and ton-miles of freight transported on its lines, moving under joint rates and interchanged with the said applicants, for the year ended December 31, 1921; said statement to be so compiled as to show separately the tons and ton-miles of such freight, originating at or destined to points on respondents' lines and of such freight as to which said respondent is an intermediate carrier; and in each case the revenues accruing to said respondent, and, so far as practicable, the tons, ton-miles, and revenues of said applicants in respect of said traffic. Each respondent having immediate connection with applicants' lines shall further show separately the number of tons and of ton-miles of such

freight received from and delivered to said applicants at each point of interchange therewith.

The case was set for hearing and duly heard before an examiner of the Commission on May 15 and 16, 1922. The Orient introduced testimony and exhibits. Respondents, although represented by counsel, introduced no evidence, aside from furnishing the information the Commission had required them to furnish.

On August 9, 1922, the Commission, Division 4, issued its report and order. (Rec. pp. 3, 9.) It found that the divisions of interstate joint rates then accruing to the Orient were unjust, unreasonable, unduly preferential, etc., as between the Orient and its several direct connections; and ordered that divisions of the several direct connections should, for the future, not exceed certain percentages of the divisions then accruing to them, respectively, and that the Orient's divisions for the future should be increased by amounts corresponding to the reductions of the divisions of the several direct connections. The order is set forth in full below:

ORDER.

At a Session of the INTERSTATE COMMERCE COMMISSION, Division 4, held at its office in Washington, D. C., on the 9th day of August, A. D. 1922.

No. 13668.

In the matter of divisions of joint rates, fares, and charges on traffic interchanged between

the Kansas City, Mexico & Orient Railroad Company and the Kansas City, Mexico & Orient Railway Company of Texas and their connections.

A hearing and investigation of the matters involved in this proceeding having been had, and said division having, on the date hereof, made and filed a report containing its findings of fact and conclusions thereon, which report is hereby referred to and made a part hereof:

It is ordered, That on and after September 15, 1922, the divisions of interstate joint rates received by Abilene & Southern Railway Company, the Atchison, Topeka & Santa Fe Railway Company, the Chicago, Rock Island & Pacific Railway Company, the Clinton & Oklahoma Western Railway Company, Fort Worth & Denver City Railway Company, the Galveston, Harrisburg & San Antonio Railway Company, Gulf, Colorado & Santa Fe Railway Company, Midland Valley Railroad Company, Missouri, Kansas & Texas Railway Company of Texas and C. E. Schaff, receiver, Missouri Pacific Railroad Company, St. Louis-San Francisco Railway Company, the Texas & Pacific Railway Company and J. L. Lancaster and Charles L. Wallace, receivers, and the Wichita Falls & Northwestern Railway Company, hereinafter termed the connecting lines, on freight traffic interchanged with the Kansas City, Mexico & Orient Railroad Company and its receiver, and the Kansas City, Mexico & Orient Railway Company of Texas, and their successors, hereinafter termed the Orient, shall not exceed the following percent-

ages of the divisions accruing on such traffic to said connecting lines, respectively.

Abilene & Southern Railway Company	85 per cent.
The Atchison, Topeka & Santa Fe Railway Company	75 per cent.
The Chicago, Rock Island & Pacific Railway Company	80 per cent.
The Clinton & Oklahoma Western Railway Company	90 per cent.
Fort Worth & Denver City Railway Company	70 per cent.
The Galveston, Harrisburg & San Antonio Railway Company	75 per cent
Gulf, Colorado & Santa Fe Railway Company	70 per cent.
Midland Valley Railroad Company	80 per cent.
Missouri, Kansas & Texas Railway Company of Texas, and C. E. Schaff, receiver	80 per cent.
Missouri Pacific Railroad Company	80 per cent.
St. Louis-San Francisco Railway Company	80 per cent.
The Texas & Pacific Railway Company and J. L. Lancaster and Charles L. Wallace, receivers	80 per cent.
The Wichita Falls and Northwestern Railway Company	75 per cent.

It is further ordered, That divisions of joint rates applicable to traffic as to which the Orient is an intermediate carrier shall be adjusted by the connecting lines on relative basis of proportions prescribed above.

It is further ordered, That the several amounts by which the divisions accruing to said connecting lines are reduced under this order shall on and after September 15, 1922, accrue to the said Orient, in addition to the divisions theretofore accruing to said Orient on such traffic.

It is further ordered, That the resulting divisions shall be reduced as far as practicable to two-figure percentages according to the rule prescribed in said report.

It is further ordered, That said connecting lines above named, according as they participate in the transportation be, and they are

hereby, notified and required to cease and desist, on and after September 15, 1922, and thereafter to abstain, from asking, demanding, collecting, or receiving divisions of said interstate joint rates with the Orient upon other bases than those above prescribed.

It is further ordered, That said connecting lines, respectively, and the Orient shall jointly report to this commission on or before September 15, 1922, the divisions established under this order, of each of said carriers with respect to freight traffic moving under interstate joint rates between each of the stations or groups of stations for which such divisions are determined; and shall thereafter jointly report the number of tons, ton-miles, and revenue with respect to such traffic actually interchanged for the period from September 15, to December 31, 1922, inclusive, and for the period from January 1 to June 30, 1923, inclusive; said reports for the periods from September 15 to December 31, 1922, inclusive, shall be rendered on or before April 1, 1923, and the reports for the period from January 1 to June 30, 1923, inclusive, shall be rendered on or before October 1, 1923.

It is further ordered, That the word "division" as herein used, shall mean the total apportionment of a joint rate, whether determined by percentages, arbitraries, or otherwise.

And it is further ordered, That this order shall continue in force until the further order of the commission.

By the commission, division 4.

[SEAL.] GEORGE B. MCGINTY,
Secretary.

The report, which was made a part of the order, contained a saving clause permitting any carrier to except itself from the order, in whole or in part, by proper showing; and directed the Orient and its connections to make reports to the Commission, at specified intervals, showing the results of the application of the divisions established by the order. Jurisdiction was retained "to adjust on basis of such reports, the divisions, herein prescribed or stated, if such adjustment shall to us seem proper." (Rec. p. 19.)

PROCEEDINGS IN THE DISTRICT COURT.

On September 13, 1922, prior to the effective date of the order, the thirteen carriers whose divisions were reduced, appellees here, having made no application to the full Commission for a rehearing, or for a stay or suspension of the order of the Commission, Division 4, filed a bill against the United States in the United States District Court for the District of Kansas, seeking to have the order enjoined on the ground that it was invalid because unsupported by evidence and for other reasons which will appear later. (Rec. p. 2.) The United States filed a motion to dismiss the bill for want of equity. (Rec. p. 20.) The Interstate Commerce Commission intervened and filed a motion to dismiss, alleging that the bill was prematurely brought because plaintiffs had not exhausted their remedies before the Commission, in that they had not applied for rehearing by the full Commission, or applied to the full Commission for a stay or suspension of the order of the Commission,

Division 4. (Rec. p. 20.) The Commission also filed an answer, in which it denied that the order was unsupported by the evidence or invalid for any reason. (Rec. p. 21.) It is unnecessary to refer at length to the pleadings because they bring no facts into the case.

On October 2, 1922, after a preliminary hearing, the District Court issued a temporary injunction. (Rec. p. 25.) The case came on for final hearing on November 27, 1922. At that time the United States filed an answer. (Rec. p. 27.) At the final hearing, plaintiffs introduced in evidence a certified copy of the proceedings before the Commission. They offered no further evidence except first, certain tabulations compiled from the evidence before the Commission and purporting to show, among other things, the revenue per ton-mile [1] which the several direct connections of the Orient were receiving on business interchanged with the Orient, under divisions in effect prior to the Commission's order, and the revenue per ton-mile which they would receive on this business under the divisions prescribed by the order; and second, an order of the Railroad Commission of Texas, dated November 16, 1922, which dismissed an application of the Orient seeking increased divisions on intrastate traffic within the State of Texas. (Rec. pp. 33, 34.)

On March 19, 1922, the District Court entered orders overruling the motions to dismiss and making

[1] Revenue per ton-mile is the average revenue received for transporting one ton of freight for a distance of one mile.

its temporary injunction perpetual. (Rec. pp. 54, 55.) The court filed an opinion, Judge Kennedy dissenting, in which it, in effect, reached the conclusion that the Commission's order was not made for the purpose of fixing just divisions of joint rates, but for the purpose of sustaining the Orient by contributions from its more prosperous connections. (Rec. p. 35.) The court said that there was not sufficient evidence to support a finding concerning divisions. Judge Kennedy filed a dissenting opinion. (Rec. p. 48.) The court did not find it necessary to consider all of plaintiffs' contentions, but all such contentions were noticed and answered in the dissenting opinion.

QUESTIONS BEFORE THIS COURT.

The United States and the Interstate Commerce Commission took a direct appeal to this court, making sixteen assignments of error (Rec. pp. 68–72), which need not be set out at length.

The questions presented arise from the following contentions of appellees:

1. The question of the reasonableness of divisions was not properly before the Commission because the application of the Orient to the Commission, requesting that the Commission investigate the question of divisions, did not allege that the Orient's divisions were unreasonable.

2. The order is not really an order concerning divisions at all, but merely a method of transferring funds to the Orient from its connections. This contention was in substance sustained by the district

court. It rests, first, upon the view that the Commission, in fixing divisions, has no power to consult the relative financial needs of the carriers, a fundamental misconstruction of the statute and, second, upon a failure to give certain evidence, relating to the amount of service performed by the Orient and its several connections under joint rates, the burdens incident to performing such service, etc., the significance which it properly carries.

3. The order is beyond the power of the Commission because it increases the divisions of the Orient and reduces the divisions of the direct connections without at the same time considering and fixing the divisions of other railroad companies, parties to the joint rates.

4. The order is arbitrary because the percentages by which the divisions of the several direct connections are reduced are not uniform.

5. The order will result in the confiscation of appellees' property.

As to the point raised in our motion to dismiss, namely, the failure of appellees to apply for a rehearing by the full Commission before attempting to enjoin the order of Division 4 of the Commission, we merely wish to say that the course followed was not the "proper and orderly course," and was not in keeping with "equitable fitness and propriety." *Prentis* v. *Atlantic Coast Line*, 211 U. S. 210. This court should not be called upon to review orders of a division of the Commission, which the full Com-

mission has authority to rehear and reverse (Interstate Commerce Act, Sections 16a, 17(4)), unless application has been made for such rehearing.

ARGUMENT.

I.

THE QUESTION OF THE REASONABLENESS OF DIVISIONS WAS PROPERLY BEFORE THE COMMISSION.

Appellees say that the Commission's order fixing just and reasonable divisions is void because the reasonableness of divisions was not within the issues raised by the pleadings.

This contention is based upon the assumption that the Orient filed a complaint with the Commission and that this complaint was a pleading which determined the issues. As a matter of fact, the Orient did not file a complaint but merely made written application to the Commission requesting the Commission to institute an investigation upon its own motion. This application was not a complaint in the formal sense of the word and was not a pleading. It was simply a suggestion that the Commission undertake its own investigation. This the Commission did, and entered an order of investigation to which we must look for the issues. This order, set out hereinbefore, is, in part, repeated here:

> That an investigation be, and it is hereby, instituted for the purpose of inquiring into said matter, and particularly to determine whether or not the divisions of joint rates,

> fares, and charges on traffic interchanged between the said applicants and other carriers subject to the interstate commerce act are unjust, unreasonable, inequitable, or unduly preferential or prejudicial, within the meaning of paragraph (6) of section 15 of said act; and if so, the just, reasonable, and equitable divisions thereof that should be received by the several carriers.

The Commission's authority to proceed upon its own initiative is found in the following language of section 15 (6):

> Whenever, after full hearing upon complaint or upon its own initiative, the commission is of opinion that the divisions of joint rates, fares, or charges, * * * are or will be unjust, * * * the commission shall by order prescribe the just, * * * divisions * * *.

The Commission's right to initiate an investigation concerning the reasonableness of divisions is in no way dependent upon or limited by a complaint.

II.

THE COMMISSION, IN FIXING DIVISIONS, MAY CONSULT, IN THE PUBLIC INTEREST, THE FINANCIAL NEEDS OF THE CARRIERS AND IS NOT RESTRICTED TO A CONSIDERATION OF THE AMOUNT AND COST OF TRANSPORTATION SERVICE PERFORMED BY EACH CARRIER.

Prior to the Transportation Act, 1920 (41 Stat. 456), the Commission had certain jurisdiction over the division of joint rates.

However, that act greatly enlarged the powers of the Commission in this respect as well as in

a great many other respects. Section 15 (6) of the Interstate Commerce Act, as amended by the Transportation Act, reads as follows:

> Whenever, after full hearing upon complaint or upon its own initiative, the Commission is of opinion that the divisions of joint rates, fares, or charges applicable to the transportation of passengers or property are or will be unjust, unreasonable, inequitable, or unduly preferential or prejudicial as between the carriers parties thereto (whether agreed upon by such carriers or any of them or otherwise established), the Commission shall by order prescribe the just, reasonable, and equitable divisions thereof to be received by the several carriers, * * *. In so prescribing and determining the divisions of joint rates, fares, and charges the Commission shall give due consideration, among other things, to the efficiency with which the carriers concerned are operated, the amount of revenue required to pay their respective operating expenses, taxes, and a fair return on their railway property held for and used in the service of transportation, and the importance to the public of the transportation services of such carriers, and also whether any particular participating carrier is an originating, intermediate, or delivering line, and any other fact or circumstance which would ordinarily, without regard to the mileage haul, entitle one carrier to a greater or less proportion than another carrier of the joint rate, fare, or charge.

The intent and meaning of this section is to be gathered not only from the language of the section but also by reference to the scope and purpose of the statute as a whole. The Transportation Act sought to maintain and foster an adequate transportation system for the people and "to preserve for the Nation substantially the whole transportation system." To accomplish this result, it was necessary to provide methods which would produce adequate revenues to satisfy the needs of the weak carriers without producing unreasonably high returns for the stronger carriers. New rights, new obligations, and new machinery were created. The so-called group system of rate making was established, and new provisions concerning divisions of joint rates were added as an integral part of the plan for distributing funds to be raised by the new rate-fixing sections.

In *New England Divisions Case*, 261 U. S. 184, this court construed the provisions of the law giving the Commission power to fix divisions and clearly pointed out the part which these provisions play in the new scheme of regulation. The court said, beginning at page 189:

> It is contended that the order is void, because its purpose was not to establish divisions just, reasonable, and equitable, as between connecting carriers, but, in the public interest, to relieve the financial needs of the New England lines, so as to keep them in effective operation. The argument is that

Congress did not authorize the Commission to exercise its power to accomplish that purpose. An order, regular on its face, may, of course, be set aside if made to accomplish a purpose not authorized. Compare *Southern Pacific Co.* v. *Interstate Commerce Commission*, 219 U. S. 433, 443. But the order here assailed is not subject to that infirmity.

Transportation Act, 1920, introduced into the federal legislation a new railroad policy. *Railroad Commission of Wisconsin* v. *Chicago, Burlington & Quincy R. R. Co.*, 257 U. S. 563, 585. Theretofore, the effort of Congress had been directed mainly to the prevention of abuses, particularly those arising from excessive or discriminatory rates. The 1920 Act sought to ensure also adequate transportation service. That such was its purpose Congress did not leave to inference. The new purpose was expressed in unequivocal language. And to attain it, new rights, new obligations, new machinery were created. The new provisions took a wide range. Prominent among them are those specially designed to secure a fair return on capital devoted to the transportation service. Upon the Commission new powers were conferred and new new duties were imposed.

The credit of the carriers, as a whole, had been seriously impaired. *To preserve for the nation substantially the whole transportation system was deemed important. By many railroads funds were needed, not only for improvement and expansion of facilities, but for adequate maintenance. On some, continued*

operation would be impossible, unless additional revenues were procured. A general rate increase alone would not meet the situation. There was a limit to what the traffic would bear. A five per cent increase had been granted in 1914, *Five Per Cent Case*, 31 I. C. C. 351; 32 I. C. C. 325; fifteen per cent in 1917, *Fifteen Per Cent Case*, 45 I. C. C. 303; twenty-five per cent in 1918, General Order of Director General, No. 28. Moreover, it was not clear that the people would tolerate greatly increased rates (although no higher than necessary to produce the required revenues of weak lines) if thereby prosperous competitors earned an unreasonably large return upon the value of their properties. The existence of the varying needs of the several lines and of their widely varying earning power was fully realized. *It was necessary to avoid unduly burdensome rate increases and yet secure revenues adequate to satisfy the needs of the weak carriers. To accomplish this two new devices were adopted; the group system of rate making and the division of joint rates in the public interest.* Through the former, weak roads were to be helped by recapture from prosperous competitors of surplus revenues. *Through the latter, the weak were to be helped by preventing needed revenue from passing to prosperous connections.* Thus, by marshalling the revenues, partly through capital account, *it was planned to distribute augmented earnings, largely in proportion to the carrier's needs. This, it was hoped, would enable the whole transportation system to be*

maintained, without raising unduly any rate on any line. The provision concerning divisions was, therefore, an integral part of the machinery for distributing the funds expected to be raised by the new-rate-fixing sections. It was, indeed, indispensable. [Italics ours.]

And at page 193:

Plaintiffs insist that Transportation Act, 1920, did not, by its amendment of Sec. 15 (6) change, or add to, the factors to be considered by the Commission in passing upon divisions; that it had, theretofore, been the Commission's practice to consider all the factors enumerated in Sec. 15 (6); that this enumeration merely put into statutory form the interpretation theretofore adopted; that the only new feature was the grant of authority to enter upon the enquiry into divisions on the Commission's initiative; that this authority was conferred in order to protect the short lines, which because of their weakness might refrain from making complaint, for fear of giving offence; and that the power conferred upon the Commission is coextensive only with the duty imposed on the carriers by Sec. 400 of Transportation Act, 1920, which declares that they shall establish "in case of joint rates * * * just, reasonable, and equitable divisions thereof as between the carriers subject to this Act participating therein which shall not unduly prefer or prejudice any of such participating carriers." It is true that Sec. 12 of the Act of June 18, 1910, c. 309, 36 Stat. 539, 551, 552, which first conferred upon the Commis-

sion authority to establish or adjust divisions, did not, in terms, confer upon the Commission power to act on its own initiative. The language of the act seemed to indicate that the authority was to be exercised only when the parties failed to agree among themselves, and only in supplement to some order fixing the rates. The extent of the Commission's power was a subject of doubt; and Transportation Act, 1920, undertook by Sec. 15 (6) to remove doubts which had arisen. *But Congress had, also, the broader purpose explained above.* This is indicated, among other things, by expressions used in dealing with joint rates. By new Sec. 15 (6), page 486, *the Commission is directed to give due consideration, in determining divisions, to "the importance to the public of the transportation services of such carriers;"* just as by new Sec. 15 (3), page 485, the Commission is authorized upon its own initiative when "desirable in the public interest" to establish joint rates and "the divisions of such rates."

Second. It is contended that if the act be construed as authorizing such apportionment of a joint rate on the basis of the greater needs of particular carriers, it is unconstitutional. There is no claim that the apportionment results in confiscatory rates, nor is there in this record any basis for such a contention. The argument is that the division of a joint rate is essentially a partition of property; that the rate must be divided on the basis of the services rendered by the several carriers; that there is no difference between taking part of one's just share of a joint rate and

> taking from a carrier part of the cash in its treasury; and, thus, that apportionment according to needs is a taking of property without due process. But the argument begs the question. *What is its just share? It is the amount properly apportioned out of the joint rate. That amount is to be determined, not by an agreement of the parties or by mileage. It is to be fixed by the Commission; fixed at what that board finds to be just, reasonable and equitable.* Cost of the service is one of the elements in rate making. It may be just to give the prosperous carrier a smaller proportion of the increased rate than of the original rate. Whether the rate is reasonable may depend largely upon the disposition which is to be made of the revenues derived therefrom. [Italics ours.]

In *Dayton-Goose Creek Ry. Co.* v. *United States et al.*, decided January 7, 1924, this court, upholding the constitutionality of the so-called "recapture" paragraphs of the Transportation Act, in explaining the new scheme of regulation established by the Transportation Act, 1920, referred to the *New England Divisions Case* as follows:

> * * * In the *New England Divisions Case*, 261 U. S. 184, it was held that under Section 418 the Commission in making division of joint rates between groups of carriers might in the public interest consult the financial needs of a weaker group in order to maintain it in effective operationas part of an adequate transportation system, and give it a greater share of such rates if the share of the

other group was adequate to avoid a confiscatory result.

In *United States et al.* v. *Illinois Central R. R. Co. et al.*, also decided on January 7, 1924, the court again referred to the *New England Divisions Case*, saying:

> In view of the policy and provisions of that statute [Transportation Act, 1920], the Commission may properly have concluded that the carrier's desire to originate traffic on its own lines, or to take traffic from a competitor, should not be given as much weight in determining the justness of a discrimination against a locality as theretofore. For now, the interest of the individual carrier must yield in many respects to the public need. *Railroad Commission of Wisconsin* v. *Chicago, Burlington & Quincy R. R. Co.* 257 U. S. 563; *New England Divisions Case*, 261 U. S. 184.

In the light of these decisions, it is manifest that the court below based its opinion upon a construction of the statute which is fundamentally erroneous. That court said:

> Participating carriers in a joint service are entitled to be compensated in proportion to the amount of service and the cost of the service which they each render, and the fact that one of them is prosperous and the other not will not override the just right of each to a fairly proportionate share out of the joint earnings, whether the amount distributed to each be fully compensatory or be less to each than the value of the services so rendered. (Rec. p. 43.)

* * * * *

It seems to us that the inquiry was not directed to an ascertainment of the relative amount and cost of service on interchange traffic as between the Orient and the plaintiffs, and that there is no proof, including the annual reports, which will sustain a conclusion that existing divisions were unjust and inequitable at the time the order was made. The order is said to be of the blanket type. It cut through all existing divisions alike and took from each carrier a uniform per cent and added it to the Orient's share under the old divisions. A comparison of those per cents with the per centums of railway operating income disclosed that the greater the income of plaintiffs the greater the increase allowed the Orient by deductions from the more prosperous roads. This was the method of relief proposed by the Orient in its application.

The transportation act discloses no intention to vest the Commission with power to relieve the necessities of weaker lines by imposing the burden upon its connections, simply because they are able to bear it. It exhibits a contrary purpose in section 15–a, because that policy would tend to bring all carriers to the same level in earnings and there would be no necessity for loans and no fund probably could be recovered for making them.

Much stress is placed on the literal expression found in paragraph 6, section 15, as to what the Commission shall consider "in so prescribing and determining the divisions of joint rates, fares, and charges." Efficiency is an element in the cost of service, though not,

we believe, to the extent of giving a reward to inefficiency; revenue required to pay operating expenses, taxes, and a fair return is of weight in determining whether an increase in the joint rate should be allowed, and if so, whether all or what part of the increase should be given to a particular carrier, or whether there should be a decrease, and how borne; likewise, the importance to the public served, as to what the joint rate should be. But paragraph 6 is not isolated. Other parts of section 15 give the Commission power to fix joint rates. Its whole power over the subject is in contemplation in paragraph 6. There is thus a mingling in that paragraph of subject matters to be considered by the Commission on the different inquiries, some of weight in determining what the joint rates should be, in which both the public and all participating carriers are interested, and others in which the public has no concern. It is not interested as to which participant be the originating, intermediate, or delivering carrier, nor the mileage haul of each, nor how existing divisions should be divided between them, except remotely. *No one but participating carriers are interested in a redivision of existing rates. So that it seems obvious to us that the phrase in paragraph 6 so much relied upon intends that all of the subjects named for consideration have application only where the inquiry goes to the extent of both fixing and dividing the joint rates; and that where it extends only to a division of existing rates, some of the things named for consideration by the Commission have no relevancy to or weight in*

> *determining what the new divisions shall be. In such an investigation we think the controlling inquiry must necessarily be directed to ascertaining the amount and cost of service to each of them.* * * * (Rec. pp. 46, 47.) (Italics ours.)

The facts, stated hereinbefore, show that the Orient is an important carrier. The Commission stated in its report (Rec. p. 14):

> In our original report on the application of the Orient under section 210 of the Transportation Act, 1920, Finance Docket No. 3, we said:
>
> "It is not disputed that the Orient System, or at least that part which lies within the United States, is of essential importance in meeting the transportation needs of the public in the territory which it serves."
>
> Nothing appears of record in the present case to justify any different conclusion.

In *Increased Rates, 1920, Ex parte 74*, 58 I. C. C. 220, the Commission, pursuant to the provisions of the law concerning group rate making, authorized rates, in designated rate groups, designed to yield, as nearly as might be, a return of 6 per cent upon the aggregate value of the railway properties in the United States. An increase of 35 per cent was permitted in the rates in the western rate group. In determining the amount of this increase the value of the railway properties of the Orient was considered as well as the value of properties of all other carriers in the group. The financial results of the operations

of the Orient were also considered in determining the additional revenue needed to produce the requisite return. An increase of 33⅓ per cent in the rates applicable to traffic moving from a point in one rate group to a point in another rate group was also authorized. The Orient lies in the western group, so that traffic in which it participates moves either wholly within that group or between the groups. Under the level of rates so authorized by the Commission, and the divisions of joint rates which it received, the Orient not only failed to earn a fair return on the value of its properties, but failed to earn sufficient revenue to pay its operating expenses. On the other hand, the several appellees earned operating expenses and, in addition, earned returns upon their respective investments, as shown by their reports to the Commission, ranging, for 1921, from 12.13 per cent for the Fort Worth & Denver City, 10.73 per cent for the Gulf, Colorado & Santa Fe, 6.27 per cent for the Atchison, Topeka & Santa Fe, to 2.71 per cent for the Missouri Pacific and 1.39 per cent for the Clinton & Oklahoma Western. (Rec. 16.)

These are matters properly to be considered by the Commission. But the order was not based solely upon such considerations; there was other evidence to support it relating to strictly transportation considerations, which will be discussed later.

III.

THERE WAS SUFFICIENT EVIDENCE BEFORE THE COMMISSION TO SUPPORT ITS ORDER.

Appellees' contention, and the conclusion of the lower court, that there was no evidence to support the Commission's order are inextricably interwoven with, and dependent upon, the mistaken view of the statute, discussed hereinbefore, that the Commission was without power to consider the financial needs of the carriers in the interest of the public and for the purpose of preserving an important part of the transportation system. This view leads appellees to think that all evidence bearing on this phase of the case which has been discussed already, was in fact no evidence at all. Not only, however, must this evidence be ignored, before there is any foundation for appellees' claim, other evidence of an entirely different character must also be disregarded. We will now discuss this other evidence and examine the reasons which are relied upon to explain it away.

1. The fact that the Commission considered certain information shown in the annual reports made by appellees to the Commission, which were not formally introduced in evidence, does not invalidate its order.

Before discussing the sufficiency of the evidence, a preliminary question should be disposed of. Appellees say that the order is based, in part, upon facts which were not properly before the Commission. They refer to the table which appears in the Commis-

sion's report showing, among other things, certain unit revenues and unit expenses of the Orient and the several appellees. (Rec. p. 16.) This table was compiled from information shown in the annual reports, for the year 1921, made to the Commission by the carriers.

During the early part of the hearing, the examiner announced that the Commission would refer to these reports in its consideration of the case. The language of the examiner, as reported, is somewhat confusing, but the record makes his meaning perfectly plain and leaves no doubt that his statement was well understood at the time. The following is quoted from the record before the Commission, pages 73, 74:

> Examiner BURNSIDE. I have no doubt it will be necessary to refer to the annual reports of all these carriers. Will it be understood at the outset that these reports may be referred to?
>
> Mr. WOOD [Counsel for certain respondents]: If anything from the annual reports is to be considered in the case, it should be formally a part of the record by abstract or extract therefrom.
>
> Mr. BOYD [Counsel for the Orient]: I only request that the Commission consider in evidence the reports on file of the respondents and of the carriers, and while they would be available to us if we were to spend a great sum of money coming up here and getting the transcript of them, they are easily available to the Examiners and to the Commission.

Examiner BURNSIDE. The rules of practice of the Commission now effective, I think, provide that the annual reports may be used in evidence, and the requirement is that all matter which may be pertinent or which may be used in the case, be reproduced and furnished in exhibits; but that would be quite a burden, and I feel constrained to proceed under the rule of the Commission.

Mr. WOOD. The reporter will kindly note an exception on the part of the respondents to the consideration by the Commission of any matter in this case that is not formally incorporated in the record and made a part thereof and the contents of which are made the subject of cross-examination.

Examiner BURNSIDE. The exception will be noted.

Rule XIII of the Commission's Rules of Practice, in effect at the time of the hearing, provided, in part, as follows:

> (b) In case any portion of a tariff, report, circular, or other document on file with the Commission is offered in evidence, the party offering the same must give specific reference to the items or pages and lines thereof to be considered. The Commission will take notice of items in tariffs and annual or other periodical reports of carriers properly on file with it or in annual, statistical, and other official reports of the Commission. When it is desired to direct the Commission's attention to such tariffs or reports upon hearing or in briefs or argument it must be done with the precision specified in the second preceding sentence.

What the Commission did was not in violation of this rule. The first and third sentences of the rule prescribed the course which litigants must follow. The first simply indicates that if such a portion of such a document is offered in evidence the specific reference must be made, which is perfectly natural. The third makes it clear that a litigant desiring to direct the Commission's attention to a tariff or report on file with it or to a report of the Commission (and this is not confined to a report introduced in evidence), specific reference shall be made to the part to be considered, and this too is perfectly natural. This sentence also makes it clear that the litigant may make such a reference in brief or argument even though such reference is not made in the hearing, and this is consistent with the second sentence which is discussed below. Both the first and third sentences are obviously directions to litigants, based on plain dictates of convenience.

The second sentence simply gives notice to litigants that the Commission, without qualification or limitation, reserves, and proposes to use, its obvious right to take notice of the tariffs and reports on file with it and of its own reports whether introduced in evidence or not, and this is sound and proper.

If the Commission did not have this right, it would be even more restricted than are the courts, which take judicial notice of the official reports of the Commission and of other governmental agencies. The rule of the Commission should be more liberal rather than less liberal than that of the courts. The

second sentence merely states a rule eminently reasonable and certainly not too liberal for the Commission's practical necessities.

Certainly the carriers were not subjected to injustice. The matters for which the Commission referred to the annual reports were identified with the precise subject matter to which the case was devoted, and the carriers were also put on express notice of the intention to look at their own reports.

It certainly would have been entirely in order for the Commission physically to incorporate into the record in this case copies of the annual reports of each of the carriers, and in that event these carriers would not have had the right to insist that specifications be made at the hearing of the particular figures which the commission would consider. What was done was the equivalent of this and avoided a useless expense.

The commission is not bound by strict and technical rules of evidence such as prevail in the law courts. In *Interstate Comm. Com.* v. *Baird*, 194 U. S. 25, 44, the court stated:

> The inquiry of a board of the character of the Interstate Commerce Commission should not be too narrowly constrained by technical rules as to the admissibility of proof. Its function is largely one of investigation and it should not be hampered in making inquiry pertaining to interstate commerce by those narrow rules which prevail in trials at common law where a strict correspondence is required between allegation and proof.

In *Interstate Commerce Commission* v. *Louisville & Nashville R. R.*, 227 U. S. 88, the court stated at page 93 that—

> The commission is an administrative body and, even when it acts in a quasi-judicial capacity, is not limited by strict rules as to the admissibility of evidence, which prevail in suits between private parties.

The court then pointed out that it was, of course, necessary for the commission to preserve the essential rules of evidence by which rights are asserted or defended. In *Spiller* v. *Atchison, T. & S. F. Ry. Co.*, 253 U. S. 117, at page 131, the court cited the *Baird case, supra,* and the *Louisville & Nashville case, supra,* in support of the proposition that the commission should not be bound down "too closely in respect to the character of the evidence it may receive or the manner in which its hearings shall be conducted."

There can be no doubt that the procedure before the Commission, in connection with the introduction of evidence, as well as in all other respects, must be such as to preserve the substantial rights of litigants. The question is then, were appellees prejudiced by the consideration of their annual reports? These reports were filed with the Commission by them in compliance with a statutory requirement and were sworn to by responsible officers of the companies. The books and accounts of the carriers, which form the basis of the figures shown in their annual reports, are kept in accordance with a uniform system of

accounting prescribed by the Commission. To falsify a carrier's records is a misdemeanor punishable by heavy fines and imprisonment. These figures, therefore, have every guaranty of trustworthiness. Furthermore, no effort was made to deny their accuracy. Appellees had full knowledge of all information contained in their respective annual reports; they had notice that such reports would be considered, the reports are public records and were available to them, but they offered no evidence, made no attempt to refute or explain at the hearing, and did not seek a rehearing for this purpose. It seems manifest that no substantial right of plaintiffs was infringed.

In *Int. Comm. Com.* v. *Chi., R. I. & Pac. Ry.*, 218 U. S. 88, it appeared that the Commission had referred to the reports of the carriers, although apparently no point was made of it. The court not only upheld the Commission's order but referred with seeming approval to the course which had been followed. Summarizing the answer of the Commission, the court stated on page 98:

> Supplementing this the Commission sets forth that on the hearing before it oral and documentary evidence was taken, to which it gave full consideration, *and to the reports filed by the companies with it in accordance with the statute.* [Italics ours.]

Discussing the powers of the Commission, the court said, at page 102:

> These, we repeat, are great powers and means of their proper exercise are conferred.

Investigation may be conducted, and as the Commission says in its answer, "that to enable it to perform its duties such information as shows the operations and operating results of each railway is" required to be filed with it and the subject is under constant investigation.

We desire to call attention to the discussion of this feature of the case in Judge Kennedy's dissenting opinion, beginning with the last paragraph on page 49 of the record.

2. **The Evidence showed, for the period of a year, the amount of service jointly performed by the Orient and each of its connections, and the part of such service performed by each; the joint revenue arising from the joint service and how it was divided.**

The leading objection to the evidence is that it does not include tariffs showing individual joint rates, or division sheets showing how these individual joint rates are divided. Appellees say that, in the absence of such evidence, the Commission did not know what the existing divisions were and was not in a position to judge whether they were reasonable, or to fix reasonable divisions for the future. It is also objected that the record does not show what service was performed under each individual rate and what part of such service was performed by each line.

The nature of the proceeding before the Commission, and the character of the order, must determine the kind of evidence necessary to support the order.

We must keep in mind what the Commission did. It considered and treated separately each direct connection of the Orient, and the divisions of joint rates between each such connection and the Orient. But it did not make a separate adjudication in respect of each division of each rate. As between the Orient and each connection, blanket treatment was given to all divisions of all joint rates; the matter was dealt with comprehensively. The power of the Commission to deal with a divisions case, as with a rate case, in this manner cannot be denied. The blanket method of treatment was explained at length, and approved, in *New England Divisions Case*, 261 U. S. 184, 196–199. The order of the Commission there sustained was, like the order in this case, a so-called blanket order which did not deal with the divisions of particular rates, as such. It provided that the New England railroads should receive a blanket increase, approximately 15 per cent, in respect to all divisions of all joint class rates and of all commodity rates dividing on the same bases, and that the lines west of the Hudson River should accept corresponding reductions of their divisions. The court said, page197:

> Obviously, Congress intended that a method should be pursued by which the task, which it imposed upon the Commission, could be performed. The number of carriers which might be affected by an order of the Commission, if the power granted were to be exercised fully, might far exceed six hundred; the number of rates involved, many millions. The weak

> roads were many. The need to be met was urgent. To require specific evidence, and separate adjudication, in respect to each division of each rate of each carrier, would be tantamount to denying the possibility of granting relief. We must assume that Congress knew this; and that it knew also that the Commission had been confronted with similar situations in the past and how it had dealt with them.

The court pointed out that for many years before the enactment of the group rate making provisions of the Transportation Act, 1920, it had been necessary, from time to time, "to adjudicate comprehensively upon substantially all rates in a large territory;" and that the Commission had made such rate changes "by a single order, and in a large part, upon evidence deemed typical of the whole rate structure." The court continued, page 198:

> It was the actual necessities of procedure and administration which had led to the adoption of that method in passing upon the reasonableness of proposed rate increases. The necessity of adopting a similar course when multitudes of divisions were to be passed upon was obvious. The method was equally appropriate in such inquiries; and we must assume that Congress intended to confer upon the Commission power to pursue it.

In speaking of the power of Congress in this respect, the court stated, page 199:

> That there is no constitutional obstacle to the adoption of the method pursued is clear.

> Congress may, consistently with the due-process clause, create rebuttable presumptions, * * * and shift the burden of proof * * * . It might, therefore, have declared in terms, that if the Commission finds that evidence introduced is typical of traffic and operating conditions, and of the joint rates and divisions, of the carriers of a group, it may be accepted as *prima facie* evidence bearing upon the proper divisions of each joint rate of every carrier in that group. Congress did so provide, in effect, when it imposed upon the Commission the duty of determining the divisions. For only in that way could the task be performed.

In the case at bar, the Commission did not have before it large numbers of individual rates or information showing how individual rates were divided, and did not have information showing the amount of service which the Orient and each of its connections performed in respect of transportation under such individual rates. What purpose would such information serve in a case of this kind? Only this: If a sufficient number of individual rates and individual divisions were shown, together with information concerning the transportation performed under such rates, a basis would be furnished upon which the Commission could reach a conclusion as to whether or not the divisions, taken as a whole, were equitable and just as between the Orient and each of its connections. That is the important and ultimate fact such information would tend to show. If the record

contains other evidence upon which the Commission can form a judgment concerning this fact, there is clearly no necessity that it should include also information concerning individual rates and divisions. And the record does contain such other evidence.

We refer to exhibits 25 and 26. (Record before the Commission, pp. 326, 327.) The same information is also shown, in slightly different form and with some elaboration, in exhibits 27–41. (Record before the Commission, pp. 328–375.) These exhibits show, for the year 1921, the volume of traffic moving on joint rates and interchanged between the Orient and each of its direct connections; the part of the joint service performed by the Orient and the part performed by its connection; the revenue arising from the joint service, and how that revenue was divided. For example: Such exhibits show that, during 1921, the Santa Fe and the Orient interchanged 26,278 tons of freight; that with respect to such freight the Orient performed 8,162,294 ton-miles of transportation and the Santa Fe 5,793,098 ton-miles; that the revenue arising from this joint service was $218,827.71 of which the Orient received $106,889.59 and the Santa Fe $111,938.12; that the per ton-mile revenue of the Orient was 1.310 cents and the per ton-mile revenue of the Santa Fe 1.932 cents. Like information is shown as to the business interchanged on joint rates between the Orient and each of its connections.

This was better evidence of how the joint rates divided, as a whole, than any number of individual rates and divisions, short of every such rate and

division, would have been. See the dissenting opinion on this point. (Rec. 52.)

Evidence "deemed typical of the whole rate structure" will support a finding, in a general rate case, as to each rate in that structure, by raising a rebuttable presumption concerning each rate. A like presumption arises from similar evidence in a divisions case. "Typical" evidence in this sense does not mean evidence directly representative of every individual rate; it means evidence tending to show the general situation. It is the conclusion, thus reached, as to the whole structure of rates, from which the presumption directly arises concerning individual rates, as to which there has been no special showing. Therefore, the evidence which has been described, and the evidence which will be later referred to, bearing upon the reasonableness of the divisions between the Orient and each of its connections, as a whole, is sufficient to enable the Commission to make a finding as to each division of each rate.

In this case the Commission came much nearer to specific treatment than in the *New England Divisions Case* because here it dealt separately with each connection and considered, as between it and the Orient, the relative aggregate services and revenues therefrom and the relative average revenues per ton-mile. In the *New England Divisions Case* a much more sweeping treatment was sustained. There not only were all class rates and commodity rates which divided on the same bases treated alike, but all car-

riers east of the Hudson River were treated alike, as were all carriers west of the river.

In the blanket or general treatment of the divisions of all joint rates between two carriers, or in the blanket treatment of rates themselves, there is always a possibility that in special and exceptional cases certain rates or divisions will result which are unjust or unreasonable. The Commission recognized this possibility and made adequate provision for it, clearly indicating its willingness and desire to correct injustices which might be found to arise in connection with the comprehensive manner in which the Commission decided it was necessary to deal with the subject. (See page 12 of this brief.) Such a course was approved by this court in *Railroad Commission of Wisconsin* v. *Chicago, Burlington & Quincy R. R. Co.*, 257 U. S. 563, 579; and in *New England Divisions Case*, 261 U. S. 184, 199. The Commission retained jurisdiction of the case for the express purpose of making such modifications of its order as might appear desirable from reports reflecting the actual results of the application of the divisions prescribed, which the Commission required the respondents to make from time to time.

3. The evidence shows that costs of operation on the line of the Orient are relatively high as compared with such costs on the lines of its connections.

The Orient has a light traffic density which naturally makes for high operating expenses. This is reflected in the operating ratios[1] for the year 1921 of

[1] The operating ratio is the percentage of revenue represented by operating expenses.

the Orient and its several connections which, as calculated from the figures shown in the Commission's report (Rec. p. 16) are set out below:

Orient	111.60
Abilene & Southern	69.44
Atchison, Topeka & Santa Fe	69.12
Chicago, Rock Island & Pacific	81.36
Clinton, Oklahoma & Western	82.30
Fort Worth & Denver City	66.27
Galveston, Harrisburg & San Antonio	87.35
Gulf, Colorado & Santa Fe	73.18
Midland Valley	76.35
Missouri, Kansas & Texas Ry. of Texas	80.12
Missouri Pacific	83.53
St. Louis-San Francisco	73.52
Texas & Pacific	84.66
Wichita Falls & Northwestern	66.59

The table in the Commission's report (Rec. p. 16) shows the operating expenses per equated ton-mile,[2] per car-mile, and per train-mile on the entire volume of business handled by the Orient and each of its connections. These figures indicate that transportation can not be performed on the line of the Orient as economically as it can be performed on the lines of its connections, with the exception of certain short lines such as the Abilene & Southern and the Clinton, Oklahoma & Western, which obtain short hauls and correspondingly high unit revenues, as is shown by the table.

In speaking of the significance of figures shown in the table in the Commission's report, Judge Kennedy stated in his dissenting opinion (Rec. p. 54):

[2] An "equated ton-mile" is a transportation unit derived by adding to the ton-miles of freight three times the number of passenger miles. In other words, passenger miles are "equated" into ton-miles on the basis of three ton-miles to one passenger mile.

> The compilation therefore as referred to might not be conclusive, independent of all other evidence, as proving the unfairness of the joint rates to the Orient and yet itself an element which the Commission had the right to take into consideration; and in fact, it may be the best available method of securing in its larger sense a reflection of the fairness of a division of joint rates among carriers. This compilation shows generally a greater net revenue, in relation to operating expense, to plaintiff carriers than to the Orient.

As a further indication of high operating costs on the Orient, it appears that the Orient is subject to unusual expenses. There is no coal on its line and no timber suitable for ties. Accordingly fuel and ties are necessarily bought at points on foreign lines and the Orient is obliged to pay the costs of transportation to its line. As the result of the increases in freight rates since 1917, the transportation charges on coal and ties which the Orient used in 1921 were $98,000 more than they would have been if the 1917 rates had been in effect. (Rec. p. 13; Record before the Commission, pp. 87, 273.) It is common knowledge that for the past few years extremely high prices for labor and materials have prevailed. This would naturally affect a carrier whose traffic is light more injuriously than a carrier with a greater traffic density.

The fact that the Orient failed to earn operating expenses in 1917 by only $45,600, and actually earned slightly more than its operating expenses for

the three-year period ending December 31, 1917, whereas it showed enormous operating deficits for the years 1920, 1921, and up to the time of the hearing (Rec. p. 12), indicates how burdensome to it were these conditions which came about after Federal control as result of high prices of labor and material. The very unfavorable results in 1920 and 1921, as compared with 1917, are not to be explained by a falling off of traffic, for apparently traffic increased, as the following figures show: (Rec. p. 13.)

Year.	Revenue freight originating on road.	Revenue freight from connecting carriers.	Total revenue carried, freight.
	Tons.	*Tons.*	*Tons.*
1917	356,593	831,128	1,187,721
1918	277,123	880,423	1,157,546
1919	395,143	917,492	1,312,635
1920	521,807	904,986	1,426,793
1921	471,324	910,430	1,381,754

Livestock, grain, and cotton are among the principal commodities which originate on the Orient and are interchanged by it with its connections. Grain constitutes 25.11 per cent of all such traffic, livestock 23.59 per cent, and cotton 9.49 per cent. The movement of livestock involves a 100 per cent empty haul and also an expensive bedding service which is performed by the Orient; the movement of grain involves long empty hauls, and in addition the Orient, as originating carrier, bears considerable expense in coopering cars; the cotton movement also involves burdensome empty hauls and demands an expensive compression service on the line of the Orient. (Record before the Commission, pp. 84–87.)

4. The Commission's finding did not rest solely upon evidence relating to the financial needs of the Orient and its several connections; the evidence relating strictly to transportation matters tended to show that the Orient's divisions were unjust.

From what has been said it appears that the Commission's finding was supported not only by evidence of the relative financial needs of the Orient and its connections, but also by a consideration of strictly transportation matters. The record showed the volume of traffic interchanged between the Orient and its several connections, the amount of service each performed as to such business, the revenue accruing for the joint service, and how that revenue was divided. The evidence also tended to show that transportation could not be performed as economically on the line of the Orient as on the lines of its direct connections, and that, in the light of the relative services performed, the existing divisions did not properly reflect the relative burdens borne by the connecting carriers. In this connection it is interesting to observe that the average per ton-mile revenue of the Orient on its interchange business was 1.47 cents and its operating expense per equated ton-mile on all business was 1.99 cents; whereas the average per ton-mile revenue for the Orient's immediate connections, on business interchanged with the Orient, was 1.185 cents, and the operating expense per equated ton-mile of these connections, on all business, was 1.144 cents. The figures are for the average figures for all connections, taken together. The figures for each

connection separately are shown on page 33 of the record.

We make no claim, of course, that the Commission had before it figures from which it could reach its conclusion by the simple application of a mathematical formula based upon unit revenues, unit costs, operating ratios, etc. It has always been recognized that rates could not be fixed by formula, and this is true also of fixing divisions. The exercise of judgment and discretion in the consideration of the many pertinent factors and elements is called into play. If it were necessary to ascertain exactly the cost of a transportation service before a reasonable rate could be fixed, the Commission's hands would be tied.

In considering whether there is evidence which will support the order, it should be remembered:

1. Although appellees were served with a notice of the hearing before the Commission and were there represented by counsel, they offered no evidence. Furthermore, with the opportunity to apply to the full Commission for rehearing and to make a showing of facts in the light of the action of Division 4, they decided not to do so. Under these circumstances the evidence is entitled to every significance which it reasonably carries.

2. The court "will not examine the facts further than to determine whether there was substantial evidence to sustain the order." *Int. Comm. Comm.* v. *Union Pacific R. R.*, 222 U. S. 541. *New England Divisions Case*, 261 U. S. 184, 204. It will not weigh the evidence for the purpose of determining whether

it would have reached the same conclusion which the Commission reached.

3. The Commission is an expert body, informed by experience in matters of rates and railroad statistics. Its findings are fortified by presumptions of truth. In *O'Keefe, Receiver*, v. *United States*, 240 U. S. 294, at page 303, it was stated:

> It is said there was no evidence to enable the commission to fix a just compensation to that line for a haul of a given number of miles as compared with the just compensation for a haul of a greater or lesser number of miles; no evidence as to terminal expenses, or cost of road haul, or the relation between these factors, or as to other elements which should be taken into account in fixing a division according to the length of haul. But the evidence showed that some limitation was called for, and, in general at least, furnished the materials upon which to base it. A tribunal such as the Interstate Commerce Commission, expert in matters of rate regulation, may be presumed to be able to draw inferences that are not obvious to others.

In *Interstate Comm. Com.* v. *Chi., R. I. & Pac. Ry.*, 218 U. S. 88, at 110, it was said:

> One question remains for discussion, the finding of the commission upon the character of the rate, whether it is unreasonable as decided. Such decision, we have said with tiresome repetition, is peculiarly the province of the commission to make, and that its findings are fortified by presumptions of truth, "due to

> the judgments of a tribunal appointed by law and informed by experience." *Illinois Central Railroad Company* v. *Interstate Commerce Commission*, 206 U. S. 454, and cases cited. The testimony in this case does not shake the strength of such presumptions.

In Minnesota Rate case, 230 U. S. 352, at 419, the court stated:

> The dominating purpose of the statute was to secure conformity to the prescribed standard through the examination and appreciation of the complex factors of transportation by a body created for that purpose.

Therefore, even if financial needs could be ignored, the court would not substitute its judgment for the Commission's judgment, and say that transportation conditions showed that the Orient's divisions were as high as they ought to be; and certainly it can not be said that there was no substantial evidence before the Commission bearing on that question. It must be remembered that the Commission's function was to determine *comparative* reasonableness of divisions as between the Orient and its respective connections. Substantial evidence was before the Commission bearing on the comparative quantities of service performed in handling the joint traffic; upon the comparative revenue therefor; and upon the comparative cost of handling all traffic. Such transportation factors furnished a substantial basis upon which the Commission "expert in matters of rate regulation," and "informed by experience" could base a valid judgment as to the comparative reasonableness of

the divisions from a transportation standpoint, even apart from the respective financial needs of the carriers.

IV.

THE COMMISSION'S ACTION IN FIXING DIVISIONS BETWEEN THE ORIENT AND ITS DIRECT CONNECTIONS WITHOUT AT THE SAME TIME READJUSTING THE DIVISIONS OF OTHER CARRIERS PARTIES TO THE RATES WAS WITHIN ITS STATUTORY AUTHORITY.

Appellees take the position that the Commission's order is void because it fixes divisions between the Orient and its direct connections without at the same time fixing the divisions to be received by other railroad companies participating in the joint rates, or without dividing the rate between the Orient, on the one hand, and all other carriers participating in it, on the other.

A large part of the interchange traffic did not move beyond the direct connections and no railroads other than the Orient and its direct connections were parties to the rates applicable to this traffic. (Record before the Commission, pp. 332 to 339, Exhibits 30 to 35; pp. 368 to 375, Exhibits 40 and 41.) As to joint rates which extended beyond the lines of the Orient and its direct connections—that is to say, joint rates in which other railroads participated—the Commission did not change the divisions received by the other carriers, but considered and reapportioned only that part of the revenue which accrued jointly to the Orient and each of its direct connections for the part of the service which they jointly performed.

In *New England Divisions Case*, 261 U. S. 184, it was held that the Commission had authority to divide joint rates on the Hudson River, that is, to fix the amount of the divisions to be received by the carriers east of the river, taken together, and the amount of the divisions to be received by the carriers west of the river, taken together, without at the same time undertaking the unworkable task of fixing the particular divisions to be received by each of the lines East of the Hudson and each of the lines West of the Hudson. In that case the court said, page 201:

> It is contended that the order is void because it confines itself to dealing with the main, or primary, divisions of the joint rates at the Hudson River and fails to prescribe the subdivisions of that part of the rate which goes to the several carriers. The argument is, that if the Commission acts at all in apportioning the joint rate, its action is invalid unless it prescribes the proportion to be received by each of the connecting carriers. For this contention there is no warrant either in the language of the act, the practice of the carriers, or in reason. *The duty imposed upon the Commission does not extend beyond the need for its action.* If the real controversy is merely how much of the joint rate shall go to the carriers east of the Hudson and how much to the carriers west, there is nothing in the law which prevents the Commission from letting the parties east of the river, and likewise those west of it, apportion their respective shares among themselves.

And so here, the Commission was certainly not required by the statute to delay the decision of the question before it, i. e., the proper apportionment of the joint revenue accruing to the Orient and its immediate connections, until it could prepare itself to decide questions which it was not undertaking to decide in this proceeding.

The statute must be given a practical interpretation in the light of actual situations which arise under it; to construe it otherwise would be to completely block its remedial purpose. The magnitude of the task which would confront the Commission, and the impracticability of performing it in the ordinary divisions case, if it could not fix divisions between the Orient and its direct connections without at the same time fixing the divisions of all other carriers participating in the rates, will be readily understood when it is remembered that the Orient, like all important carriers, is a party to joint rates which run from coast to coast, and which are, or may be, participated in by every railroad in the United States, with perhaps some exceptions. If the Commission can not divide, between two connecting carriers, that part of a rate which accrues to them jointly, but must divide the entire rate, the enormous scope of the investigation necessary to obtain even typical evidence of conditions, financial, operating, and otherwise, existing on all lines which will be affected by the order, is obvious. It would preclude action except in a few cases of sufficient magnitude to justify the great expense.

The Commission's action in this case was much more specific than in the *New England Divisions Case;* here the connections were separately considered and treated. In such a case it would be a practical impossibility to obtain evidence, appropriate in character and sufficient in amount, to justify a finding as to all carriers participating in the joint rates.

If the direct connections feel that their divisions are unfair as compared with divisions of other carriers participating in the joint rates, whose divisions were not considered in this case, there is nothing to prevent them from readjusting such divisions by negotiation or, if they are unable to do that, from bringing the question before the Commission.

V.

THE ORDER IS NOT ARBITRARY BECAUSE THE DIVISIONS OF CERTAIN APPELLEES WERE DECREASED BY GREATER PERCENTAGES THAN THE DIVISIONS OF OTHERS.

Appellees object to the course followed by the Commission in giving separate consideration to, and reaching different conclusions concerning, the several direct connections of the Orient, because, in their opinion, it will interfere with the competitive situation now existing between connections in respect of business interchanged with the Orient. For an answer it is only necessary to point to the following language in the Commission's report, which is made a part of its order (Rec. p. 19);

> Carriers for which rates of reduction of divisions are prescribed lower than are pre-

scribed for their competitors on competitive business to or from the Orient may voluntarily meet the greater reduction in divisions prescribed for their competitors.

It will be recalled that in *New England Divisions Case* the carriers west of the Hudson complained because varying percentages of decreases were *not* applied to the different carriers. Clearly the question of making or not making varying percentages, that is, the question of the extent of the blanket treatment, is within the sound discretion of the Commission and to be determined in the light of the practical possibilities and necessities of each particular case. It is conceivable that an order of the Commission might be attacked on the ground that it exceeded the necessities of the case in the way of blanket treatment, but it is difficult to understand how an order, based on a proper showing of facts, would be subject to criticism on the ground that it was too specific.

VI.

THERE IS NO SHOWING THAT THE COMMISSION'S ORDER WILL RESULT IN CONFISCATION.

Appellees claim that the Commission's order is invalid because it will result in confiscation. The contentions which were relied upon in the lower court and which presumably will be urged here may be summarized as follows:

1. Certain appellees, whose divisions of joint rates are reduced by the order, were at the time of the order earning, on all business, a return of less than

five and three-quarters per cent upon the value of their respective railway properties.

2. The divisions prescribed by the Commission, applied to present rates, are noncompensatory to some of the appellees.

There is one answer which goes to both contentions. The Commission, in dividing a joint rate, does not thereby fix the compensation of the individual carriers. The amount of such compensation depends not only upon the way the rate is divided but upon the amount of the rate. Until the Commission has refused to permit the rate to be increased, no question of confiscation would arise. When the Commission fairly and equitably divides a joint rate between the participating carriers, its action is not open to objection because the revenue accruing to a particular carrier is not sufficiently high to yield a fair return. If this were not true, the Commission would have no power to divide a noncompensatory joint rate. So long as carriers continue to participate in a joint rate which is not sufficiently high to yield a fair return to all carriers engaged in the joint service, they cannot be heard to complain if the Commission reapportions the revenue so as to bring about a more equitable adjustment, even if the result should be to diminish the amount of loss theretofore sustained by one of the carriers by inposing some loss upon another. If some of the rates are too low the carriers have a right to raise them to a reasonable basis.

The contention concerning the failure of certain of appellees to earn a return of five and three-quarters per cent seems to be based upon the thought that Section 15a guarantees to each carrier a return of five and three-quarters per cent. But Section 15a merely directs the Commission to establish rates which will yield "as nearly as may be" to the carriers as a whole, or in rate groups designated by the Commission, a fair return, now fixed at five and three-quarters per cent, on the aggregate value of their railway properties. The provision applies only to "carriers as a whole" or "in rate groups" and in no sense guarantees to each individual carrier a return of five and three-quarters per cent.

On the facts, there is no proof at all tending to support the claim of confiscation, whereas, to establish confiscation, clear, convincing and unmistakable proof is necessary.

In *Knoxville* v. *Water Co.*, 212 U. S. 1, the court, discussing the proof of confiscation required, quoted with approval the following language from *Ex parte Young*, 209 U. S. 123:

> * * * no injunction ought to be granted unless in a case reasonably free from doubt. We think such rule is, and will be, followed by all the judges of the Federal courts.

The court continued in the *Knoxville case* as follows:

> The same thought, in effect, was expressed in *San Diego Land & Town Company* v. *National City*, 174 U. S. 739, 754, "judicial interference should never occur unless the case

> presents, clearly and beyond all doubt, such a flagrant attack upon the rights of property under the guise of regulations as to compel the court to say that the rates prescribed will necessarily have the effect to deny just compensation for private property taken for the public use." And in *San Diego Land & Town Company* v. *Jasper*, 189 U. S. 439, after repeating with approval this language, it was said (p. 441): "In a case like this we do not feel bound to re-examine and weigh all the evidence, although we have done so, or to proceed according to our independent opinion as to what were proper rates. *It is enough if we can not say that it was impossible for a fair-minded board to come to the result which was reached.*" (Italics ours.)

Appellees produced no evidence whatever before the court to prove confiscation. It has never been the practice to set aside as confiscatory rates made by a commission except in cases where full and convincing proof has been offered to the court, directed to the specific rates which the commission has prescribed. It would be an extraordinary extension, or rather reversal, of the policy of the courts toward commission-made rates for a court, in the absence of the introduction of any proof at all, to infer confiscation merely from the evidence which had been presented to the Commission, unless, of course, the specific issue of confiscation had been fully covered in the presentation to the Commission. But the record before the Commission shows that the issue was not covered in the presentation to

the Commission. There also appellees failed to offer any proof whatever and failed also to avail themselves of a further opportunity to offer proof by asking the Commission as a whole to reconsider the action of Division 4.

If it be said that the record shows that in certain instances the ton-mile revenue which certain appellees will receive *on the specific freight traffic handled* will be less than their operating costs per equated ton-mile *on their entire freight and passenger traffic handled*, the answer is that a confiscation case could not possibly stand on any such proof alone. The presumption relative to the validity of the Commission's action could not be thus overcome; there would be too many missing links.

If then it be said such a result proves that the Commission had no right to consider the relative equated ton-mile costs on all traffic on the Orient and on its respective connections as bearing on the comparative reasonableness of the divisions to the Orient and its connections, the answer is that such a subquestion confuses two fundamentally different subject matters. The suggestion is equivalent to saying that no evidence is sufficient to sustain a finding as to reasonableness of divisions unless it is so full, complete, and specific as to supply a definitive answer to the question of confiscation if that question be subsequently raised. The suggestion ignores the well-established distinction that any substantial evidence, which would justly appeal to an expert rate-making tribunal, will sustain an order of the Com-

mission; while only complete and convincing evidence, negativing all reasonable doubts, is sufficient to justify a court in overthrowing an order of the Commission as confiscatory. Such suggestion overlooks the distinction between that evidence which supplemented by presumptions in favor of a commission's order will sustain that order, and evidence which will overcome all presumptions in favor of a commission's order and show the order to be confiscatory.

This further thought deserves consideration: The traffic moving between the Orient and points on appellees' lines is important to the public. That traffic should continue to move. It is desirable that the joint rate should pay the joint costs, and if possible a fair return as well. If the rate is not sufficiently high to do this, the matter may be presented to the Commission to see whether the joint rate may be raised. But unless and until that is done, is there any reason why the burden of transportation at less than full pro rata cost should fall on the Orient rather than on its connections? Is it more in the public interest that it should sustain losses of this character than that they should do so? Is not such a broad question of comparative burden precisely such a question as is submitted to the discretion of the Commission by section 15 (6)? The evidence before the Commission threw substantial light on the question of comparative reasonableness. Certainly it did not even approach a showing of confiscation in the constitutional sense, even if the

court were to look solely at the interests of the Orient's connections and disregard entirely the status of the Orient.

CONCLUSION.

We submit that a careful review of the proceedings before the Commission shows that the Commission made a reasonable investigation "which * * * fitted the subject to be investigated"; that it dealt with the question before it in a rational, practical fashion; that its order will work substantial justice and is safeguarded in every possible manner to avoid minor incidental injustices and to provide remedies by which such injustices, if any should develop, can be remedied.

In *Interstate Comm. Com.* v. *Chi., R. I. & Pac. Ry.* 218 U. S. 88, it was said, at page 103:

> The outlook of the Commission and its powers must be greater than the interest of the railroads or of that which may affect those interests. It must be as comprehensive as the interest of the whole country. If the problems which are presented to it, therefore, are complex and difficult, the means of solving them are as great and adequate as can be provided. And arguments which point out and assail the imperfection which may appear in the result, this court has taken occasion to characterize. "They assail," it was said, "the wisdom of Congress in conferring upon the Commission the power which has been lodged in that body to consider complaints as to violations of the statute and to correct

them if found to exist, *or attack as crude or inexpedient the action of the Commission in the performance of the administrative functions vested in it, and upon such assumption invoke the exercise of an unwarranted judicial power to correct the assumed evils.*" *Interstate Commerce Commission* v. *Illinois Central Railway Company*, 215 U. S. 452, 472. (Italics ours.)

The District Court should have dismissed the bill of complaint.

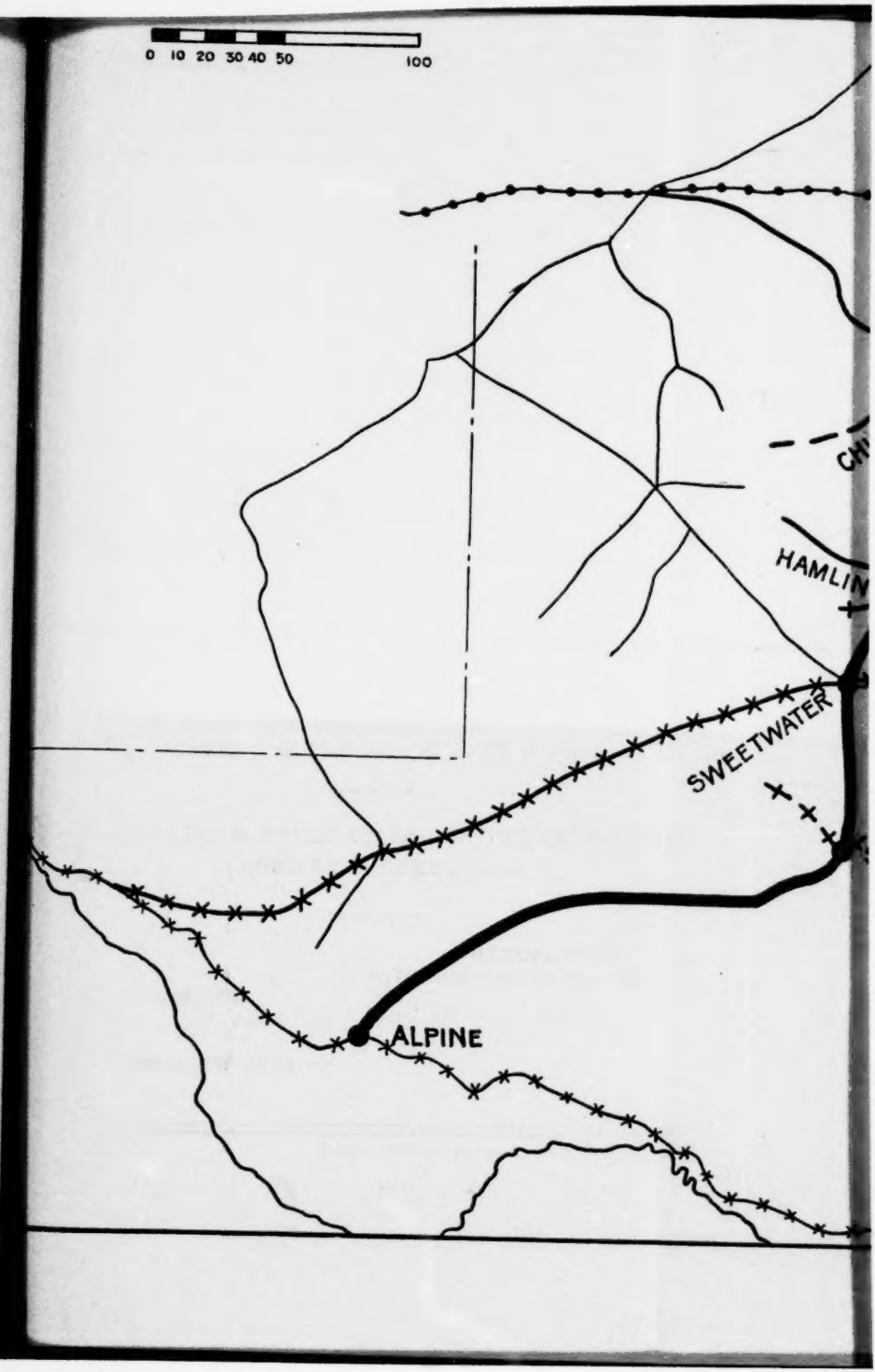
J. CARTER FORT,

For the Interstate Commerce Commission.

P. J. FARRELL,

Of Counsel.

FEBRUARY, 1924.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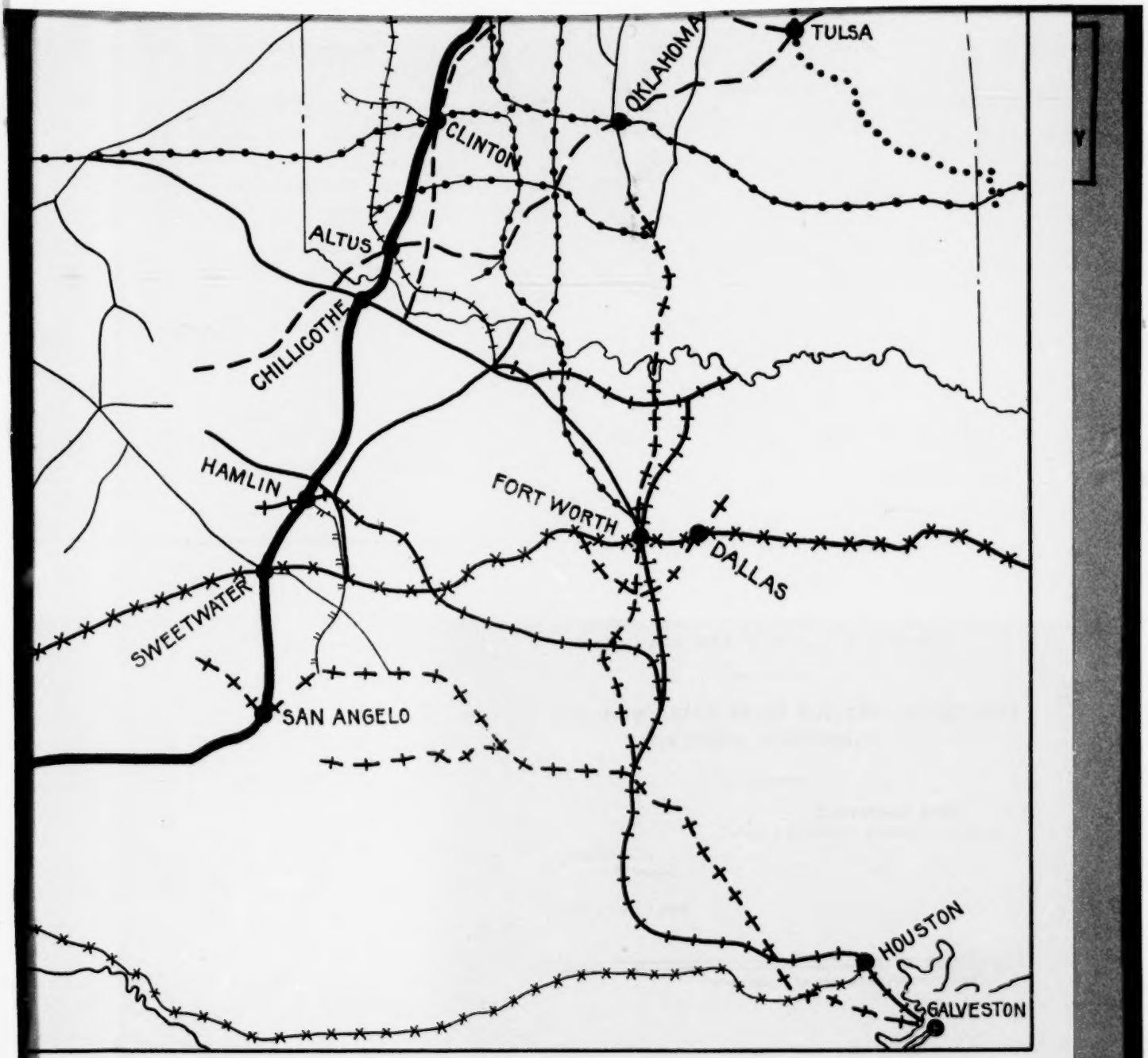
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